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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER

REPORTER

VOLUME 76

DECISIONS RENDERED BETWEEN APRIL 13, 1915, AND JULY
6, 1915

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JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE STATE OF OREGON

July 6, 1915.

First Judicial District—

Jackson }
Josephine } FRANK M. CALKINS, Medford.

Second Judicial District—

Coos }
Curry } JOHN S. COKE, Marshfield.
Douglas }
Benton } JAMES W. HAMILTON, Roseburg.
Lane }
Lincoln } GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn } PERCY R. KELLY, Department No. 1, Albany.
Marion } WILLIAM GALLOWAY, Department No. 2, Salem.

Fourth Judicial District—

..... } JOHN P. KAVANAUGH, Department No. 1, Port-
land.
..... } ROBERT G. MORROW, Department No. 2, Port-
land.
..... } HENRY E. MCGINN, Department No. 3, Port-
land.
Multnomah } GEORGE N. DAVIS, Department No. 4, Portland.
..... } WILLIAM N. GATENS, Department No. 5, Port-
land.
..... } CALVIN U. GANTENBEIN, Department No. 6, Port-
land.

Fifth Judicial District—

Clackamas JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow }
Umatilla } GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River }
Wasco } WILLIAM L. BRADSHAW, The Dalles.

Eighth Judicial District—

Baker GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant }
Harney } DALTON BIGGS, Ontario.
Malheur }

Tenth Judicial District—

Union	}	JOHN W. KNOWLES, La Grande.
Wallowa		

Eleventh Judicial District—

Gilliam	}	DAVID B. PARKER, Condon.
Sherman		
Wheeler		

Twelfth Judicial District—

Polk	}	HARRY H. BELT, Dallas.
Yamhill		

Thirteenth Judicial District—

Klamath	GEO. NOLAND, Klamath Falls.
---------------	----	-----------------------------

Fourteenth Judicial District—

Lake	BERNARD DALY, Lakeview.
------------	-------------------------

Fifteenth Judicial District—

Crook	}	T. E. J. DUFFEY,* Prineville.
Jefferson		

Sixteenth Judicial District—

Tillamook	}	GEORGE R. BAGLEY, Hillsboro.
Washington		

Seventeenth Judicial District—

Clatsop	}	JAMES A. EAKIN, Astoria.
Columbia		

* Appointed May 22, 1915

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

April 13, 1915.

County.	Name.	Official Address.
Baker.....	Godwin, C. T.....	Baker
Benton.....	Clarke, Arthur.....	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Mullins, C. W.....	Astoria
Columbia.....	Cooper, W. H.	St. Helens
Coos.....	Liljeqvist, Lawrence A.....	Coquille
Crook.....	Wirtz, Willard H.....	Prineville
Curry.....	Johnson, James C.	Gold Beach
Douglas.....	Neuner, Jr., George.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Cozad, V. G.....	Canyon City
Harney.....	Sizemore, Geo. S.....	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Kelly, E. E.....	Medford
Jefferson.....	Myers, W. F.....	Culver
Josephine.....	Miller, W. T.....	Grants Pass
Klamath.....	John Irwin.....	Klamath Falls
Lake.....	Gibbs, O. C.....	Lakeview
Lane.....	Devers, Joseph M.....	Eugene
Lincoln.....	Stewart, J. F.....	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Brooke, W. H.....	Ontario
Marion.....	Ringo, Ernest R.....	Salem
Morrow.....	Wells, Glenn Y.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Sibley, Joseph E.....	Dallas
Sherman.....	Huddleston, C. M.....	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Steiwert, Frederick H.....	Pendleton
Union.....	Eberhard, Colon B.	La Grande
Wallowa.....	Corkins, O. M.....	Enterprise
Wasco.....	Bell, W. A.....	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Starr, J. K.....	Fossil
Yamhill.....	Conner, B. L.....	McMinnville

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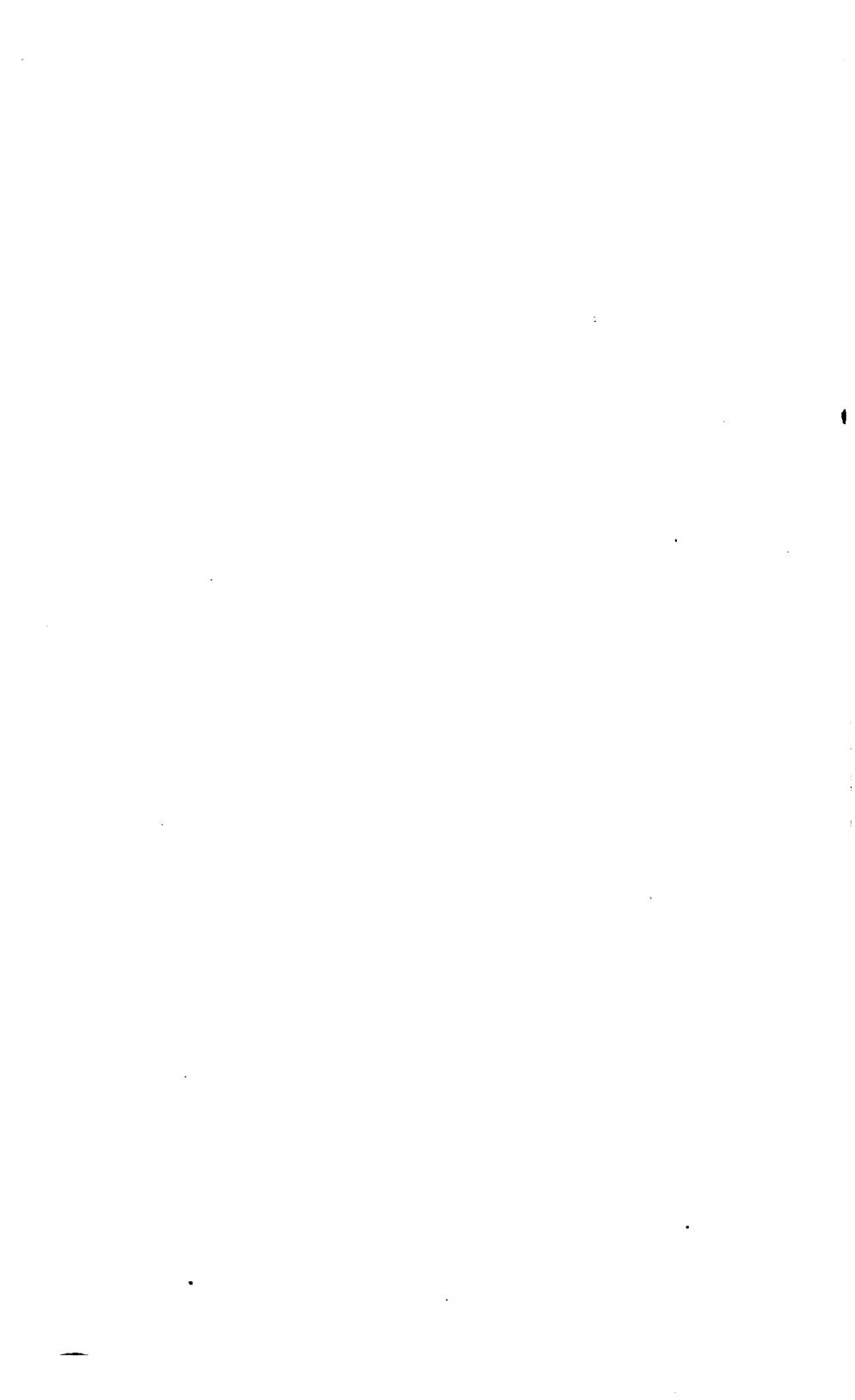
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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Motion to strike abstract of record from files denied September 8, 1914.

Argued and submitted on the merits March 11, reversed April 13, 1915.

FRANCIS v. BOHART.*

(143 Pac. 920; 147 Pac. 755.)

Appeal and Error—Record—Objections.

1. Respondent's remedy, when the appellant's abstract misquotes the bill of exceptions and contains argumentative matter proper only for a brief, is to serve on the clerk of the Supreme Court and on appellant's counsel an additional abstract, as prescribed by Supreme Court Rule 7 (56 Or. 616, 117 Pac. x), and not by motion to strike the abstract from the files.

ON THE MERITS.

Sales—"Conditional Sale."

2. A contract whereby the possession of personal property is delivered to the buyer, who agrees to pay a price therefor with the condition that the title remain in the seller until the price is paid, is a conditional sale.

[As to what constitutes conditional sale, see notes in 46 Am. Rep. 295; 94 Am. St. Rep. 234. As to sale conditioned that title remain in vendor until payment, when and against whom fraudulent, see note in 58 Am. St. Rep. 386. As to sale conditional upon the final payment of the purchase price, see notes in 37 Am. Rep. 664; 40 Am. Rep. 21.]

Sales—Conditional Sale—Suit for Purchase Price—Effect.

3. Where one who sold goods under a conditional sale contract recovered judgment against the buyer for the purchase price and

*As to whether bringing action for purchase price is waiver of right of vendor in conditional sale to recover property in specie, see note in 23 L. R. A. (N. S.) 144.

REPORTER.

levied execution against part of the property, he thereby elected to treat the title as having passed to the buyer, and cannot thereafter retake the property under his reserved title.

[As to election of remedies, when resort to one bars the prosecution of another, see note in 1 Am. St. Rep. 626.]

From Lane: LAWRENCE T. HARRIS, Judge.

This is an action by I. M. Francis against W. A. Bohart. From a judgment in favor of plaintiff, defendant appeals. Respondent moves to strike appellant's abstract of record from the files.

MOTION DENIED.

Mr. Fred E. Smith, for the motion.

Mr. H. E. Slattery, contra.

Opinion PER CURIAM.

1. The plaintiff respondent moves to strike from the files the appellant's abstract of record, for the reason, in substance, that it misquotes the bill of exceptions and contains argumentative matter proper only for a brief. Based also upon this, he further moves to dismiss the appeal.

The practice in such cases is governed by Rule 7 of this court (56 Or. 616, 117 Pac. x), which is as follows:

"If the respondent shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving a copy thereof, deliver to the appellant's counsel one, and to the clerk of this court, with proof of service upon appellant, sixteen printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions involved in the appeal."

This rule is controlling in such cases, and if the abstract was unsatisfactory to the plaintiff, his remedy is formulated by the rule.

The motion is denied.

DENIED.

Reversed April 13, 1915.

ON THE MERITS.

(147 Pac. 755.)

Department 2. Statement by MR. JUSTICE BURNETT.

This action was commenced to recover the possession of seven cows, two heifers, and four calves, of the alleged value of \$745. The defendant admits the possession of the cattle and the demand for their custody. Otherwise he denies the complaint. He further answers that the plaintiff represented to him that he had sold the property to one Thienes; that he relied upon the statement, and so bought the property afterward from Thienes without any knowledge of plaintiff's reservation of title, and hence the latter is estopped to assert title in the same as he does in this action. Again, the defendant states that the plaintiff sold the property here in contention, with other personalty, to the defendant's grantor at one time, in one sale, and as a single transaction, with the agreement that the title to all the chattels should remain in this plaintiff until his grantee had fully paid for the same; that in an action at law subsequently commenced the plaintiff here recovered a judgment against his grantee for \$383.75, upon which he issued an execution and levied it upon a large part of the personal property included in the original transaction between the plaintiff and the conditional purchaser of the same; and that on account of the levy the plaintiff waived his reservation of title to all the property included in the original conditional sale and vested the same in the contracting purchaser, from whom the defendant bought. The reply denies the matter pleaded in es-

toppel, and admits that the plaintiff sold the personal property described in the complaint with the condition, as stated in the answer, that the title should not pass from the plaintiff until the purchase price was paid; and that, at the time the defendant claims to have bought the property, his grantor, plaintiff's grantee in the transaction, was in default in his contract to purchase the chattels, all of which the defendant well knew. The reply further charges that the purchase of the property alleged by the defendant was without actual consideration and with a fraudulent purpose and intent, known to and participated in by both the defendant and his seller, of placing the property beyond the reach of plaintiff and hindering and delaying him in the collection of his claim against the defendant's grantor. It was conceded that in the original transaction between the plaintiff and his grantee all the property was sold at one time, in one sale, and in one transaction, with the reservation of title as stated. The recovery of the judgment, issue of the execution thereon, and levy upon certain personal property are admitted, but the reply states that the levy did not include the particular property involved in this action. From a judgment on a verdict in favor of the plaintiff after a jury trial, the defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery*.

For respondent there was a brief over the names of *Mr. J. F. Brumbaugh*, *Mr. Fred E. Smith* and *Mr. G. N. Parmenter*, with an oral argument by *Mr. Brumbaugh*.

MR. JUSTICE BURNETT delivered the opinion of the court.

2. A contract whereby the possession of personal property is delivered to a buyer, who agrees to pay a price for the same, with the condition that the title remain in the seller until the price is paid, constitutes a conditional sale of the personalty: *Singer Mfg. Co. v. Graham*, 8 Or. 17 (34 Am. Rep. 572); *Rosendorf v. Baker*, 8 Or. 240; *Schneider v. Lee*, 33 Or. 578 (17 Pac. 269); *Herring-Marvin Co. v. Smith*, 43 Or. 315 (72 Pac. 704, 73 Pac. 340); *McDaniel v. Chiaramonte*, 61 Or. 403 (122 Pac. 33). In the case last cited, concerning a breach of a contract by the purchaser, the opinion quotes from 1 Mechem on Sales, Section 615, giving to the seller four remedies, namely:

“(1) He may treat the contract as rescinded upon default of the buyer and recover the goods. In that event, that is his only remedy. (2) He may treat the contract as in force, but broken by the buyer, and if by the transaction the buyer contracts to pay, the seller may retake the goods and recover damages for the breach. (3) He may, if the buyer agreed to pay the price, waive the return of the goods and sue for the price. (4) He may, if the contract permits it, without rescinding, take possession of the goods and hold them as security for the fulfillment of the contract.”

3. It appears without dispute in the testimony that the judgment recovered by the plaintiff here against his grantee was for the purchase price of a portion of the chattels which the latter had sold and had not paid to the plaintiff. As stated in *Thienes v. Francis*, 69 Or. 171 (134 Pac. 1195, 138 Pac. 845), in construing this very contract, the sale by plaintiff's grantee before title passed to him constituted a breach of the agreement. The plaintiff then had a single cause of action

arising out of a contract single in its terms for a single price, and, if he would proceed, he was put to his election which of the remedies offered him by law he should pursue. An action for the purchase price of the property is an action on the contract, and necessarily proceeds upon the theory that the title has been waived by the seller and vested in the buyer. Indeed, the weight of authority is to the effect that the commencement of any litigation which depends upon the hypothesis that the title has passed to the purchaser on waiver by the seller constitutes an election which the plaintiff cannot afterward revoke. In *Hickman v. Richburg*, 122 Ala. 638 (26 South. 136), the plaintiff had contracted to sell lumber to the defendant, reserving title until the price was paid. It was held that the unsuccessful attempt of the plaintiff to establish a lien upon the structure in which the lumber was used constituted a waiver of the reservation of title, and that it was an election which barred the attempt to recover the identical property or damages for its conversion. In *Butler v. Dodson*, 78 Ark. 569 (94 S. W. 703), it was decided that bringing an action for the selling price is a waiver of the reservation of title. To the same effect are *Smith v. Barber*, 153 Ind. 322 (53 N. E. 1014); *Alden v. Dyer*, 92 Minn. 134 (99 N. W. 784); *Orcutt v. Rickenbrodt*, 42 App. Div. 238 (59 N. Y. Supp. 1008); *Fredrickson v. Schmittroth*, 77 Neb. 724 (112 N. W. 564); *Mathews Piano Co. v. Markle*, 86 Neb. 123 (124 N. W. 1129); *Sioux Falls Adjustment Co. v. Aikens*, 32 S. D. 154 (142 N. W. 651); *North Robinson Dean Co. v. Strong*, 25 Idaho, 721 (139 Pac. 847); *Chase v. Kelly*, 125 Minn. 317 (146 N. W. 1113); *Purdy v. Dunn Machinery Co.* (Ga.), 82 S. E. 888; *Frisch v. Wells*, 200 Mass. 429 (86 N. E. 775, 23 L. R. A. (N. S.) 144). In commencing his action for the purchase

price or part of the property, the plaintiff adopted the alternative of suing for the price instead of resuming the custody of the property by replevin or recovering damages in trover for its conversion. The contract being single, there was a breach of the whole agreement giving rise to but one cause of action for the price. Having proceeded on the plan of recovering the sum stipulated to be paid under the contract for the sale of the property, the judgment rendered in that action is conclusive upon both parties, not only for what was actually litigated, but as to every other matter which the parties might have litigated and settled as incident to and necessarily connected with the subject matter of the litigation: *White v. Ladd*, 41 Or. 324 (68 Pac. 739, 93 Am. St. Rep. 732); *Colgan v. Farmers & Mechanics' Bank*, 69 Or. 357 (138 Pac. 1070). Having a grievance against his adversary, a party cannot submit him to the slow torture of multiplied litigation, when the whole matter can be settled in one action or suit. In other words, possessing but a single cause of action, he may not split it up to be used as material for several actions: *Indiana B. & W. Ry. v. Koons*, 105 Ind. 507 (5 N. E. 549); *Wilson v. Buell*, 117 Ind. 315 (20 N. E. 231); *Willoughby v. Atkinson Furniture Co.*, 96 Me. 372 (52 Atl. 756); *Mallory v. Dawson etc. Co.*, 32 Tex. Civ. App. 294 (74 S. W. 593).

In short, the prosecution of the action for the purchase price of part of the property was an irrevocable election to proceed upon the postulate that the title to the property had passed to the purchaser named in the contract. Having entered upon that course, the plaintiff was bound to pursue it consistently to the end. He cannot shift his position and afterward undertake to recover in specie the property which was the subject of the contract. It having been possible to sue for

the whole purchase price, it was his duty to have done so, if he chose to take that remedy at all, and he must be held to have accepted the results of that judgment as a determination of all his rights under the contract. The facts recited appeared without dispute from the pleadings and evidence offered at the trial, and it was the duty of the court to sustain the motion made by the defendant for a verdict in his favor at the close of all the evidence, for, under the authorities cited, the action of the plaintiff in suing for the price, even of a part of the property, was a waiver of the title, which having passed from him, he cannot recover possession of the chattels involved. Many other errors are assigned which, in the view we have taken of the case, are unnecessary to be considered.

The judgment is reversed.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE
and MR. JUSTICE BEAN concur.

Argued March 23, affirmed April 13, 1915.

STATE EX REL. v. KIRKPATRICK.

(148 Pac. 51.)

Municipal Corporations—Mayor—Vacancies in Office.

1. Pendleton City charter (Laws 1899, p. 711) provided that the council shall select one of its members to preside over the body and perform the duties of the mayor, in case of his absence or inability to act. Other portions of the charter provide for the filling of any vacancies in office by appointment of the mayor with consent of the council. *Held*, that, as other vacancies were so carefully provided for, the chairman of the council, in case of the death of the mayor, succeeds to the office until it can be regularly filled by election.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

An action was commenced upon the relation of John W. Dyer, against R. F. Kirkpatrick, for the purpose of determining who, if anyone, was the mayor of the City of Pendleton. W. F. Matlock was, in December, 1913, installed as the duly elected and qualified mayor of Pendleton, and he continued to serve as such officer until August 31, 1914, when he died. On February 4, 1914, John W. Dyer, who was at that time a councilman, was elected chairman of the common council. From the date of the death of W. F. Matlock the duties of the office of mayor were assumed and performed by John W. Dyer, and no other person claimed any right to the office until January 22, 1915. On the last-mentioned date, at a regular meeting of the common council, all the councilmen being present, the following resolution was adopted:

“Be it resolved by the common council of the City of Pendleton that whenever a vacancy, by death, resignation or otherwise, occurs or exists in the office of mayor of the City of Pendleton, the common council of the city shall, by resolution, fill such vacancy by choosing some qualified citizen of the city to be mayor thereof, who shall, when so chosen and qualified, be the mayor thereof until the next regular election for city officers, and until his successor to the mayor’s office shall be elected and qualified.”

Immediately thereafter a second resolution was adopted, which reads thus:

“Be it resolved by the common council of the City of Pendleton that R. F. Kirkpatrick, a citizen of said city, be, and he is hereby, chosen and selected as, and to be, the mayor of said city, to fill the vacancy now existing in the office of mayor occasioned by the death of the late William F. Matlock.”

Both resolutions were voted for by all the councilmen except John W. Dyer, who voted against the resolutions, and at the time explained that he considered himself to be the mayor of Pendleton by reason of being the chairman of the common council. Immediately after the adjournment of the council Kirkpatrick filed an oath of office, and since that time has claimed to be the mayor. The judgment of the Circuit Court was favorable to Dyer, and thereupon the defendant appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. James A. Fee*.

For respondent there was a brief over the names of *Mr. Frederick Steiwer*, District Attorney, and *Messrs. Carter & Smythe*, with an oral argument by *Mr. Charles H. Carter*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The charter of Pendleton appears in Laws of 1899, page 711. It will be necessary, first, to call attention to such parts of the charter as may be material here, because the phraseology of the organic law of the municipality is the storm center of this litigation. The government of the city is vested in a mayor and common council, consisting of eight members, who shall hold their offices until their successors are elected and qualified: Article II, Sections 1, 4.

Section 1, Article IV, provides that:

“At the first regular meeting of the common council after the first day of January following each election, or as soon thereafter as practicable, the council shall choose by ballot one of its members to preside over the council and perform the duties of mayor in the ab-

sence of the mayor or his inability to act. He shall be designated as chairman of the council, and in the absence of the mayor from the city or, if he be from any cause unable to act, said chairman of the council shall have and exercise the powers and perform all the duties of the mayor. * * ”

Section 3, Article III, reads:

“If any person who may be elected or appointed to any office under this act shall remove from the city or absent himself therefrom for thirty days or more without leave from the common council, or shall fail to qualify within twenty days after his election or appointment, the office which he held, or to which he may have been elected or appointed shall become vacant; and during the absence of any officer or his inability to act for a less time than thirty days the common council may fill the office by temporary appointment during such absence or inability, and the person or persons so appointed shall have, during their term of the office, all the power and authority of the regular incumbent.”

The filling of vacancies is provided for by Section 6, Article III:

“In case of a vacancy occurring in any of the offices provided under this act, the mayor, with the consent of the common council, shall fill such vacancy until the next regular election or the time fixed by this act for the appointment of appointed officers, and until a successor shall be elected or appointed and qualified. * * ”

The differences between the contesting parties arise from the claim of the relator that by virtue of being chairman of the common council, he became mayor automatically upon the death of Matlock, and the contention of defendant that the charter does not give any directions for filling a vacancy in the office of mayor. The defendant argues that Article IV, Section 1, of the

charter contemplates that the chairman of the council is clothed with the authority of mayor only when there is a mayor *in esse*, that from the time of the death of W. F. Matlock there was no mayor *in esse*, and therefore Dyer was not entitled to act as chief executive, citing *Babbidge v. Astoria*, 25 Or. 417 (36 Pac. 291, 42 Am. St. Rep. 796), in support of the conclusion urged.

The charter of the City of Pendleton does not furnish any authority for the filling of a vacancy in the office of mayor *eo nomine*. It is conceded by both parties that no language pertinent to vacancies is to be found, except in Sections 3 and 6 of Article III. The first portion of Section 3 specifies certain contingencies upon the happening of which an office shall become vacant, and the second portion appertains to a temporary vacancy for a less time than 30 days. If Dyer became mayor, upon the death of Matlock, it was because of the provisions contained in Article III, Section 6, and in Article IV, Section 1. The single method for filling a vacancy is contained in Article III, Section 6, and the procedure therein prescribed is for the mayor, with the consent of the common council, to fill such vacancy until the next regular election. If there be no mayor and no person with the powers of a mayor, then a vacancy cannot be filled because a vacancy cannot be supplied except by the combined action of the mayor and council. This section of the charter proceeds on the assumption that there would, at all times, be a mayor or some person vested with the authority of that office. Vacancies in every office are provided for in Section 6, except the single one of mayor, and since the legislature has in this section so carefully guarded against such vacancies, it is fair to conclude that the principal office of the municipality has not been forgotten, and that another section of the char-

ter designates some person who shall act as mayor. The language, "if the mayor be from any cause unable to act," contained in Section 1 of Article IV, is broad enough to cover any possible contingency. The substance of that section is that, "if the mayor be from any cause unable to act," then the "chairman of the council shall have and exercise the powers and perform all the duties of the mayor." We therefore conclude that upon the death of W. F. Matlock the duties of the office of mayor devolved upon the chairman of the council, and Dyer, being such chairman, was therefore vested with the authority of mayor. The legislative act under discussion is perhaps anomalous, but it is harmonious withal. There are no conflicting or contradictory provisions. Taking the instrument by its four corners, and thus viewing it, leads to the conclusion that the plan of the charter contemplates that at all times the office of mayor would be filled, either by some person elected as such or by someone rightfully exercising the functions of the office. The council is commanded in advance to prepare for any possible happening by electing a chairman of the council, in order that the person so chosen may, if need be, take up the reins of government. The charter prevents any real vacancy by conferring upon the chairman of the council all the duties and responsibilities of mayor. For all practical purposes the council did select a mayor when that body elected a chairman of the council, whose right to act, however, was suspended until, from any cause, the chief executive of the city was unable to act. The organic law defining the powers of the municipality prescribed the mode by which these powers shall be exercised, and that mode is the measure of the power. One mode is prescribed for the office of mayor, and another mode for all other offices;

the former preventing a real vacancy by anticipating most, if not all, contingencies.

The conclusion reached here is not a departure from *Babbidge v. Astoria*, 25 Or. 417 (36 Pac. 291, 42 Am. St. Rep. 796). Every judicial expression must be read in the light of the facts upon which a conclusion is predicated. Marked and material features differentiate the case of *Babbidge v. Astoria*, 25 Or. 417 (36 Pac. 291, 42 Am. St. Rep. 796). The Astoria charter expressly declares that death creates a vacancy in all offices. Furthermore, in that case only one mode, applicable to all offices alike, is provided for filling a vacancy, all vacancies whatsoever being filled by the council; but in the instant case vacancies are filled by the mayor with the consent of the council.

It follows from the conclusion reached by us that John W. Dyer has been and is rightfully vested with the powers and authority attaching to the office of mayor, and that R. F. Kirkpatrick is not entitled to the office.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Argued March 23, affirmed April 13, 1915.

BOWLSBY v. FITZGERALD.

(148 Pac. 53.)

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

W. L. Bowlsby was convicted, in the recorder's court of the City of Pendleton, of violating an ordinance which prescribed certain regulations for pawnbrokers

and second-hand dealers. The proceedings of the recorder's court were carried to the Circuit Court by a writ of review, and from a judgment dismissing the writ plaintiff appeals.

AFFIRMED.

For appellant there was a brief and oral argument by *Mr. James A. Fee*.

For respondent there was a brief over the name of *Messrs. Carter & Smythe*, with an oral argument by *Mr. C. H. Carter*.

MR. JUSTICE HARRIS delivered the opinion of the court.

This case is a companion to *State ex rel. v. Kirkpatrick, ante*, p. 8 (148 Pac. 51) wherein we held that John W. Dyer had been legally acting as mayor of the City of Pendleton. The ordinance mentioned was assailed by the plaintiff on the theory that John W. Dyer did not possess the authority of mayor when, on December 9, 1914, he signed the ordinance as "Chairman and Acting Mayor," and that therefore the ordinance is void. The conclusion reached by this court in *State ex rel. v. Kirkpatrick, ante*, p. 8 (148 Pac. 51), controls the instant case.

The ordinance was signed by a person lawfully acting as mayor, and the judgment rendered by the Circuit Court is affirmed.

AFFIRMED.

Argued March 30, reversed April 6, modified on rehearing April 20, 1915.

CUNNINGHAM v. FRIENDLY.

(147 Pac. 752.)

Costs—Taxation—Bill of Costs—Verification.

1. The attorney for a party entitled to costs had a right to verify the cost bill.

Costs—Taxation—Bill of Costs—Service.

2. The objection that a cost bill was not properly served was waived by appearing and objecting to the bill.

Costs—Items Recoverable—Costs on Appeal.

3. Where a judgment was reversed and the costs in the court below awarded to defendant, he was not entitled to tax a clerk's fee incurred in taking the appeal.

Appeal and Error—Presumptions in Support of Judgment.

4. On an appeal from an order allowing disputed items of costs where there was nothing to show the incorrectness of certain items, they would be allowed to stand, as error would not be presumed.

Costs—Costs on Appeal—Expense of Extending Testimony.

5. Where on appeal a party procured an original and two copies of the testimony as extended, he could not charge for the copies in his cost bill, though he may have needed them.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action by A. A. Cunningham against J. C. Friendly. At a former hearing before this court, the case was reversed, and costs in the court below were awarded to the defendant, who filed his cost bill, in which were items amounting to \$4.80, clerk's fees, and cost of extending testimony: Original \$56, copies \$18 and \$15, total \$89. The plaintiff has objected to the item of clerk's fees for the reason that it was incurred in taking the appeal. He also objected to all of the items of \$89, except \$30, saying that is all the original should have cost, and that the copies were unnecessary.

The item of \$15 was stricken out and the remainder allowed. REVERSED. MODIFIED ON REHEARING.

For appellant there was a brief over the names of *Mr. James N. Davis* and *Mr. William W. Dugan, Jr.*, with an oral argument by *Mr. Davis*.

For respondent there was a brief over the names of *Mr. Franklin F. Korrell* and *Mr. Earl C. Bronaugh*, with an oral argument by *Mr. Korrell*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1, 2. Counsel for plaintiff strenuously contend the cost bill was not properly verified, and was filed prematurely. The record shows a cost bill was filed on the 8th of May, the date of the mandate, which cost bill was verified by defendant's attorneys. This he had a right to do: *Morris v. Rodgers*, 26 Or. 578 (38 Pac. 931). Objection is also made that it was not properly served, but counsel appeared and objected to it; and, having done this, he waived his right to raise any objection as to service. It also appears that two cost bills were filed, but there is only one here, and we can only judge of what is done by the orders of the court.

3-5. If the item of \$4.80 was incurred in taking the appeal, it was improperly allowed; but there is nothing here to show what it was for, and, as error is not presumed, this item should stand. The item of \$56 for original should also stand, as there is nothing here to show its incorrectness; but there is no authority of law for the allowance of \$18 for a copy. Although counsel may have needed these copies, they cannot charge for them in the cost bill, and the item of \$18 must be stricken out.

This necessitates a reversal of the case, and it is so ordered. **REVERSED. MODIFIED ON REHEARING.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Modified April 20, 1915.

ON REHEARING.

(147 Pac. 752.)

In the former opinion of this court the judgment was reversed. Counsel for respondent now moves to modify it, instead of reversing it.

As this is a case where the court can determine what judgment ought to be entered, it will be modified by ordering the court below to strike out the sum of \$18 allowed for copy of testimony, and affirmed as to the balance, with costs in this court to the appellant.

MODIFIED ON REHEARING.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Argued March 3, affirmed March 23, rehearing denied April 20, 1915.

ROBISON v. HICKS.

(146 Pac. 1099.)

Dower—Bar—Joinder in Deed of Husband.

1. A wife joining her husband in executing a deed barred her inchoate right of dower; and hence no estate, right, title or interest remained to be conveyed by her subsequent deed after her husband's death.

Trusts—Enforcement—Consideration—Support of Aged Person—Charge on Land.

2. Where the grantee named in a deed of land in trust to sell it and apply the proceeds in caring for the aged grantor during her life, with remainder over, neglected or refused to properly maintain the grantor, and an action against him would not have afforded an adequate remedy, a court of equity, upon proper and timely application, might charge the land for such maintenance, if it had not been conveyed.

Equity—Default Judgment—Vacation.

3. Defendant in a suit to quiet title, who had an opportunity to set forth by answer the facts subsequently alleged in her complaint as a foundation upon which to assert a lien upon the premises, and in whose pleading nothing appeared to explain a reasonable cause for a default judgment against her, or to excuse her neglect and failure to answer, could not have it set aside.

Trusts—Estate Conveyed—Fee.

4. In view of Section 7103, L. O. L., declaring that the term "heirs" or other words of inheritance are unnecessary to create or convey an estate in fee simple, a deed to one in trust to sell the land conveyed an estate in fee.

[As to interest in land with power to dispose of, when amounts to an estate in fee, see note in 49 Am. Dec. 115.]

Vendor and Purchaser—Support of Grantor—Lien—Action to Enforce—Pleading.

5. In an action to impress a lien for maintenance on real property which had been previously conveyed to one in fee in consideration of the grantor's maintenance, it was necessary for the complaint to aver that defendants, taking by mesne conveyances, acquired their title with knowledge or notice of plaintiff's claim of lien, in order to let in proof thereof, before the lien could be impressed on the land.

From Jackson: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Mrs. C. J. Robison against J. E. Hicks, administrator of the estate of Charles Bland, de-

ceased, and others, to set aside a decree and to impress an alleged lien on real property. The material averments of the complaint, as to the first cause of suit, are to the effect that on November 2, 1904, John Bailey was the owner in fee simple of lots 1 and 2 in block 35, Coolidge Addition to the City of Ashland, Oregon, and on that day he and his wife executed a deed of the premises to Charles Bland, in trust to sell the land conveying a clear title, and to use the proceeds in caring for Mrs. Bailey during her life, and after her death to give the remainder of the avails, if any, to the defendants Mathew Otter, Wright Bailey, Anna Bland, Mary Young, Joseph W. Bailey and John W. Bailey, which deed was duly recorded November 5, 1904. That two days thereafter John Bailey, the grantor, died intestate, and his estate has never been administered upon, though Charles Bland took charge of all the property thereof and converted it into money, but refused to support or care for Mrs. Bailey or to furnish her with the necessaries of life. That she was quite aged, nearly blind, and unable to wait upon herself, and pursuant to her promise to pay well for the service, the plaintiff, Mrs. C. J. Robison, moved to her house August 19, 1906, and cared for her until May 19, 1908, during which time Bland charged the plaintiff \$10 a month as rent of the house and allowed her only \$8 a month for the care so bestowed, and that the services so performed were reasonably worth \$75 a month, amounting to \$1,575, no part of which has been paid. That on March 25, 1908, Mrs. Bailey executed to the plaintiff a deed to lot 1 in the block mentioned, which deed was duly recorded the following day, and that the plaintiff claims a lien on both lots as security for the payment of the sum so stated. That the defendants Eli Albert and wife, by mesne conveyance from Bland, acquired the

title to the west half of such lots, and the defendants J. F. Porter and wife and Mary Netherland and husband secured from the same source the title to the east half thereof. That the defendants who are named in the trust deed as Mr. Bailey's beneficiaries received from Bland the proceeds of the sale of the lots. That on August 1, 1910, Bland died intestate, and on October 11, 1913, the defendant J. E. Hicks was duly appointed administrator of his estate and thereupon legally qualified for the trust. That whatever rights either of the defendants may have secured in or to such lots are subject to the plaintiff's paramount claim of lien thereon.

For a second cause of suit the material averments of the first cause are repeated and it is alleged:

"That on the 25th day of March, 1909, Charles Bland, in his own name and individual capacity, filed a suit in the Circuit Court for the State of Oregon, in and for the county of Jackson, against Mrs. C. J. Robison, plaintiff herein, alleging that he held the fee-simple title to said above-described premises and land, the object of which suit was to quiet the title to said land, said lots 1 and 2, block 35, Coolidge Addition to the City of Ashland, in him, the said Charles Bland, and for a decree declaring that the said Mrs. C. J. Robison had no right, title or interest in and to said premises adverse to the said Charles Bland; and that on April 15, 1909, default was taken in said suit against the said plaintiff, Mrs. C. J. Robison, for want of answer of their plea; and that on May 10, 1909, a decree was entered in said suit and in accordance with said complaint and to the effect that the said Mrs. C. J. Robison had no right, title or interest in and to the said property adverse to the said Charles Bland. To the records and files in said cause this plaintiff refers, and the same being public records they are hereby made a part of this complaint.

"Plaintiff further avers and says that the said Charles Bland, in his individual name and capacity, did

not at that time hold, nor has he or had he at any time, prior or subsequent to the 25th day of March, 1909, the date of filing said complaint, held the fee-simple title or any title at all to said property or any part thereof, and that said suit aforesaid and the allegations in said complaint contained, and all of them, were false and untrue and said decree was obtained by means of deceit, artifice or concealment, with relation to the true facts as to the title of said premises and was a fraud upon the court, this plaintiff, the legatees named in said deed of trust, as set out in paragraph 2 of this complaint, and subsequent purchasers of said property.

“That the said Charles Bland or his representatives or heirs have never asserted any right, interest or title to said premises by virtue of said decree of judgment aforesaid, and do not now claim any right, title or interest thereto by virtue of said decree of judgment.”

The remaining averment of the complaint is in substance that the decree referred to was secured by imposition in that the court was not informed as to the facts; and that the determination so reached clouds the title of the defendants who have obtained deeds of the premises, tends to depreciate the value of the land, and prejudices the rights of such owners and of the plaintiff as a lienor.

A demurrer, interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit as to either of the defendants, was sustained, and the plaintiff declining further to plead, the suit was dismissed and she appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. William Valandingham* and *Mr. A. H. Davis*, with an oral argument by *Mr. Valandingham*.

For respondents there was a brief over the names of *Mr. E. D. Briggs* and *Mr. H. V. Richardson*, with an oral argument by *Mr. Briggs*.

Opinion by MR. CHIEF JUSTICE MOORE.

An examination of the allegations of the complaint will show that the deed executed by Mrs. Bailey to the plaintiff was duly recorded March 26, 1908, and imparted notice of the conveyance before Charles Bland instituted his suit against Mrs. Robison to quiet her alleged title.

1. Mrs. Bailey joined her husband in executing the deed to Bland, barring her inchoate right of dower, and hence no estate, right, title or interest remained to be conveyed by her deed to the plaintiff.

2. If, as alleged in the complaint, Bland neglected or refused properly to care for or support Mrs. Bailey, at whose request Mrs. Robison performed that service, and an action at law against Bland would not have afforded an adequate remedy, a court of equity upon proper application when made in due season would probably have imposed upon the land a charge for such maintenance, if the premises had not been conveyed: *Watson v. Smith*, 7 Or. 448; *Thomas v. Thomas*, 24 Or. 251 (33 Pac. 565); *Patton v. Nixon*, 33 Or. 159 (52 Pac. 1048); *Storey-Bracher Lumber Co. v. Burnett*, 61 Or. 498 (123 Pac. 66).

3. When Bland instituted his suit against Mrs. Robison to quiet her alleged title to lot 1, she then had an opportunity to set forth by answer the facts which she now alleges in her complaint as a foundation upon which to assert her claim of lien upon the premises. Nothing appears from her pleading to explain a reasonable cause for the default decree which was rendered against her, or to excuse her neglect in failing to answer.

4. It is stated in the complaint herein that such decree was obtained in consequence of Bland's fraud,

which consisted in an averment in his primary pleading in the suit against Mrs. Robison that he was the owner in fee simple of the real property described in the deed executed to him by John Bailey. While there is a diversity of judicial expression as to the extent of the interest in land granted by such deed, authority is not wanting to justify the averment, now charged as fraudulent, that the conveyance to Bland transferred to him an estate in fee in the lots.

"Thus, if land," as said by a noted author, "is conveyed to trustees, without the word 'heirs,' in trust to sell, they must have the fee, otherwise they could not sell. The construction would be the same if the trust was to sell the whole or a part, for no purchasers would be safe unless they could have the fee, and a trust to convey or to lease at discretion would be subject to the same rule. *A fortiori*, if an estate is limited to trustees and their heirs in trust to sell or mortgage or to lease at their discretion, or if they are to convey the property in fee, or divide it equally among certain persons; for to do any or all of these acts requires a legal fee": 1 Perry, Trusts (6 ed.), § 315.

An inspection of what purports to be a copy of the deed executed by John Bailey to Charles Bland, and which is set forth in the complaint, discloses that the name of the grantor is not limited by the word "heirs" or other expression of like import. This omission is unimportant, however, for our statute regulating this subject, reads:

"The term 'heirs,' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple": Section 7103, L. O. L.

5. The complaint does not charge that the defendants, or either of them, who secured by *mesne* conveyance from Bland the entire real property, acquired their title with knowledge or notice of the plaintiff's

claim of lien. It was necessary to aver such fact in order to let in proof thereof before the alleged lien could be established and impressed on the land.

No error was committed in sustaining the demurrer, and the decree is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BURNETT, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Argued February 18, affirmed March 16, rehearing denied April 20, 1915.

SONNIKSEN v. HOOD RIVER GAS & ELECTRIC CO.*

(146 Pac. 980.)

Master and Servant—Injuries to Servant—Assumption of Risk.

1. Under the employers' liability law (Laws 1911, p. 16), making it a crime for an employer to originate or continue a hazard that might be prevented, an employee continuing in a hazardous service does not assume the risk of injury; for that would avoid the force of the statute and allow private persons to contract with respect to the commission of crimes.

[As to assumption of risk under Employers' Liability Act, see note in Ann. Cas. 1915B, 481. As to Federal Employers' Liability Act as superseding common and statutory law on same subject, see note in Ann. Cas. 1915B, 493.]

Master and Servant—Injuries to Servant—Actions—Jury Question.

2. Evidence on the questions whether an injured lineman knew of defects or was guilty of negligence in failing to properly insulate electric wires held, under the evidence, for the jury.

Negligence—Injuries to Servant—Actions—Contributory Negligence.

3. Under employers' liability law (Laws 1911, p. 18), Section 6, providing that the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damages, the jury, as a basis for computation, should first discover what sum of money would afford indemnity for the injury, irrespective of the cause of the hurt, and then, if both

*The authorities on the question of the constitutionality, application and effect of the Federal Employers' Liability Act are collated in an extensive note in 47 L. R. A. (N. S.) 38. REPORTER.

employer and employee are guilty of negligence, they must compare the employer's negligence with that of the employee, and from such relative estimate assess the damages.

Master and Servant—Injuries to Servant—Contributory Negligence—Instructions.

4. In a personal injury action by an employee, the court charged that his contributory negligence would not be a defense, but might be taken into account in affixing the amount of the damages; such negligence being considered in mitigation. The court further charged that the employers' liability law made it incumbent on the jury to compare the negligence of both employer and employee, and that, if the employee was negligent, such negligence might be taken into account in mitigation or reduction of damages. *Held*, that the instructions, read together, correctly stated the law that the contributory negligence of the employee, if any, must be compared with that of the employer, and considered in mitigation in assessing damages.

From Hood River: WILLIAM L. BRADSHAW, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by C. C. Sonniksen against the Hood River Gas & Electric Company, a corporation, and is based on the employers' liability law, to recover damages for personal injury resulting from a shock of electricity and charged in the complaint to have been caused by the defendant's negligence. The answer denied the want of care alleged, and averred that the hurt complained of was occasioned by the plaintiff's carelessness. The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, the plaintiff secured a judgment for \$10,000, and the defendant appeals. **AFFIRMED. REHEARING DENIED.**

For appellant there was a brief over the names of *Mr. John A. Laing*, *Mr. H. W. Strong* and *Mr. George R. Wilber*, with oral arguments by *Mr. Laing* and *Mr. Strong*.

For respondent there was a brief and an oral argument by *Mr. A. J. Derby*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that the testimony shows the plaintiff's injury was caused by his own carelessness, and hence errors were committed in denying a motion for a judgment of nonsuit and in refusing to direct the jury to find for the defendant. The evidence shows that the defendant is a corporation, and operates at Hood River, Oregon, machinery to generate electricity which is distributed by wires suspended upon poles, and that the current thus produced is used for power and lighting purposes. A part of the system, extending into the farming country, and carrying 6,600 volts, consists of three primary wires continuing east and west, and supported, at the place of the accident, by a double cross-arm, which is seven feet in length and fastened near the top of the pole. Four feet lower is another similar cross-arm sustaining two secondary wires. Two feet below the latter support are two more secondary wires extending north and south, and upheld by another double cross-arm of the same length called a "buck-arm," but placed at a right angle with the others. From each of the two outer wires of the upper group a wire called a "primary lead" extends to a fuse-box or "cut-out," which is immediately below the wire referred to of the upper group, and fastened near an end of the middle cross-arm. Primary leads extend from two fuse-boxes to a transformer, which is placed on the west side of the pole, and which rests on the top of the buck-arm, but is hung to the middle arm. The transformer reduces the current carried by the primary wires to the required voltage, which measure is conducted by leads to the secondary wires, and thence distributed to customers for domestic purposes. Just beneath the buck-arm is the bight of a guy wire that ex-

tends north to a "current breaker," and thence to the soil, where the end of the wire is attached to a grounded anchor. Fastened to the shell of the transformer is an uncovered ground wire, which is looped once around the top of the bight of the guy wire, and thence extends on the south side of the pole to the earth, into which the end of the wire is inserted and properly grounded.

The plaintiff is a lineman and repairer, having had about four years' experience, and been occasionally employed by the defendant. He testified, in effect, that its manager, A. S. Hall, on November 6, 1913, requested him to go to the pole referred to and repair the line; that he went as directed, and climbed the pole before Hall and a helper arrived; that, standing on the buck-arm, he opened the doors of the fuse-boxes, and discovered that each fuse therein had blown out; that, the manager and his assistant having arrived, they tossed up a coil of fuse and a plug puller to the witness, who removed from the cut-outs the plugs, which he connected by fuse with the primary leads and inserted in their respective places; that in doing so the fuse on the south side of the pole again blew out, thereby demonstrating that the transformer had been injured by too great a current of electricity; that Hall thereupon informed him it was unnecessary to withdraw from the fuse-box on the north side of the pole the plug to which the uninjured fuse remained attached, saying the transformer could be replaced by another the next day, and directed him to descend; that in obeying the command he took a step downward, placing the iron spur fastened to his right foot into the pole through the loop of the guy wire on the north side, his left foot resting on the buck-arm; that a wire then caught his shirt, and in trying to disengage the entanglement his right arm came in contact with the primary lead which extends from the

north fuse-box to the transformer, thereby completing the circuit, from the effect of which he was so severely shocked and burned as to necessitate the amputation of his right arm near the shoulder and his right leg near the knee.

J. R. Thompson, an electrical engineer, testified, in substance, that it was extremely dangerous to permit a bare ground wire to come in contact with a transformer, or with secondary wires, or with an uncovered guy wire, and that, without such connection, if the pole were perfectly dry, a lineman touching a primary wire might feel a little effect of the electricity, but he would not be seriously harmed.

F. L. Gifford, another electrical engineer, testified, in effect, that a ground wire from a transformer connected with a guy wire, as described herein, was a death trap.

The theory of the defense is that on April 5, 1913, the plaintiff hung the transformer referred to, and in doing so neglected to insert the primary lead on the north side of the pole in rubber hose, and that his elbow coming in contact with such exposed wire was the proximate cause of the injury.

Frank Surret, a lineman, stated upon oath that on February 12, 1913, he assisted in rebuilding on the pole the Maloney transformer in question, and that the primary leads therefrom were then covered with hose.

The plaintiff, as a witness, admitted that on April 5, 1913, he rehung the transformer and made a written report of the work to the defendant. In referring to such service he testified generally that he took down the transformer and hung another with new primary leads which come therewith, but he could not remember what insulator such wires had, nor could he call to mind that the primary leads on the old transformer were

covered with hose, nor was he able to state that the transformer which was on the pole November 6, 1913, when he was hurt was the one he hung.

A. S. Hall, the defendant's manager, testified that the electric line on which the plaintiff was hurt was put up about December 1, 1912. Referring to the completion of that branch of the system, this witness was asked by defendant's counsel: "How long did that transformer stay on the pole?" He replied:

"It stayed there until early in the spring of 1913. It burned out, due to grounding.

"Q. Was that the transformer that Sonniksen took down from the pole on the 5th of April, 1913?

"A. Yes, sir.

"Q. Do you know whether or not there was any changes or repairs or anything done to the transformer from the date that Sonniksen put it up on the pole until the time of the accident?

"A. I have no knowledge of anything having been done there; in fact, I think there was not.

"Q. If there was, would your records show it?

"A. Yes, sir.

"Q. Why would your records show it?

"A. Because every man going out to work turns in a time-card for the work done, and no one goes out on a job of that kind without my knowledge.

"Q. Is that time-card similar to this time-card introduced in evidence yesterday, made by Sonniksen?

"A. Yes, sir. They always have to be turned in in order to draw pay for the work.

"Q. So you can state from your handling of the men and the records there has been no change in the transformer?

"A. I think not.

"Q. What insulation is provided by you or by the company for the insulation of the leads from the fuse-boxes into the transformer?

"A. The transformer always comes with a manufacturer's lead—that is, a lead put in by the manufactur-

ing company—which in some cases is long enough to reach this fuse-box. Otherwise it is spliced out with weather-proof wire, and the whole thing covered with hose.

“Q. Rubber hose?

“A. Yes, sir.

“Q. And that provides an insulation?

“A. Yes, sir.

“Q. State whether or not the transformer that Sonniksen hung, and he testified he put those wires there, state whether or not after the accident you discovered anything.

“A. When I went out after the accident to examine the pole, I found that there was a section spliced in this wire to reach the fuse-box, about 8 inches long, that didn't have hose on it. It had no hose where it was spliced, and there was no hose on the lead.

“Q. He had omitted to put the hose there?

“A. Apparently so.”

This witness further testified that the covering used by his principal as an insulator on primary leads was a half-inch garden hose through which the wires from the fuse-boxes to the transformer were inserted. Referring to the standard set of materials always taken out to make such repairs, he stated that they consisted of the hose, transformer, cut-out boxes, fuse and fuse-holders, and that the plaintiff, having hung several transformers, knew what such standard outfit consisted of.

1. The foregoing is thought to be a fair epitome of the testimony relating to the cause and manner of the injury charged in the complaint. Based on such evidence, it is argued that, since the plaintiff was an experienced lineman and repairer who knew how to hang transformers, and properly to insulate primary leads, and having been supplied for that purpose with suitable rubber hose which he neglected to use, of which

fact the defendant's agents had no knowledge, that he was hurt in consequence of his own carelessness, and, such being the case, as between him and the company he cannot recover, and the provisions of the employers' liability law have no application herein. The enactment referred to was initiated by petition and ratified by a majority of the votes cast upon the measure at the general election held November 8, 1910: Gen. Laws Or. 1911, c. 3. Prior to such election, the rule invoked by defendant's counsel prevailed in this state: *Brasel v. Oregon R. & N. Co.*, 54 Or. 157 (102 Pac. 726). The legal principle announced in that case is a recognition of the ancient doctrine of assumption of risk by an employee who, with knowledge, or by the exercise of reasonable diligence might have known, of the danger to which he is or may be exposed, undertakes or continues in the service, and in consequence of the hazard sustains an injury, cannot maintain an action against the employer for the recovery of the damages suffered. The employers' liability law prescribes the duty demanded of an employer, and provides that upon his conviction for a violation of any of the clauses of the act he shall be punished by fine or imprisonment or both. The enactment having thus declared it to be a crime to originate or continue a hazard that might be prevented, the agreement of the employee to render the service will not be so interpreted as to embrace such risk; for a contrary construction would amount to a recognition of an engagement to transgress the statute, and would be invalid as against the principles under which the freedom of contract or private dealings is restricted by law for the good of the community. For the reason thus given it has been settled by repeated adjudications that the employers' liability law eliminates the doctrine of assumption of risk: *Dorn v. Clarke*

Woodward Drug Co., 65 Or. 516 (133 Pac. 351); *Dunn v. Orchard Land Co.*, 68 Or. 97 (136 Pac. 872); *Wasiljeff v. Hawley Paper Co.*, 68 Or. 487 (137 Pac. 755); *Schaller v. Pacific Face Brick Co.*, 70 Or. 557 (139 Pac. 913); *McClaugherty v. Rogue River Electric Co.*, 73 Or. 135 (140 Pac. 64); *McDaniel v. Lebanon Lumber Co.*, 71 Or. 15 (140 Pac. 990); *Filkins v. Portland Co.*, 71 Or. 249 (142 Pac. 578); *Heiser v. Shasta Water Co.*, 71 Or. 566 (143 Pac. 917).

2. It may well be doubted if the testimony given by the defendant's witnesses was sufficient even to charge the plaintiff with notice of any defect in the insulation of the primary leads, or that he was responsible for the failure to insert such wires in rubber hose. It will be remembered that Mr. Hall testified he thought no changes or repairs had been made in or to the transformer after April 5, 1913, and prior to the time of the accident, and that he also thought he could ascertain such facts from the reports handed in by the employees. He is not certain about these matters, and did not offer in evidence any daily time-ticket showing the labor performed in making repairs, or testify that such records were lost or destroyed, or that they embraced a statement of all the changes or alterations that had been made during the intervening time. The testimony received was sufficient to authorize a submission of the cause to the jury, and no error was committed as alleged.

3, 4. It is maintained that an error was committed in giving the following instructions:

"The contributing negligence of the plaintiff, if you should find him negligent, would not be a defense under the law, but it may be taken into account by you in fixing the amount of the damage. In other words, if you find that the defendant violated its duty, and be-

cause of the violation of its duty plaintiff sustained an injury, then the defendant would not have the right to say that the contributory negligence of the plaintiff, if plaintiff was guilty of contributory negligence, could serve it as an absolute defense, and in the event you would have the right only to take into consideration any contributory negligence of the plaintiff for the purpose of mitigating the damages the plaintiff may have sustained."

The defendant's counsel requested the court to give an instruction practically embodying the language quoted, but using the word "must" where "may" is employed. The solicited instruction was denied. It contained a sentence that rendered the language employed objectionable. The request will be treated, however, as calling the court's attention to the use of the proper word.

Section 6 of the employers' liability law reads:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

In *Filkins v. Portland Lumber Co.*, 71 Or. 249 (142 Pac. 578), in discussing the clause of the statute referred to, it is said:

"Construing Section 6 in connection with the other provisions thereof leads to the conclusion that the enactment makes an injury suffered by an employee, when performing the service for which he was engaged, a loss the damages resulting from which, if sustained while the person so hurt was exercising ordinary care, must be wholly liquidated by the employer; but, if the party injured was not at the time he was hurt exercising that measure of care, a part of such loss must be borne by him, while the remainder of the damages is recoverable from the other party, on the basis of the comparative degree of the fault of each."

In *Chadwick v. Oregon-Washington R. & N. Co.*, 74 Or. 19 (144 Pac. 1165), Mr. Justice BURNETT, discussing the subject, observes:

"The defendant sought to have the jury instructed on the question of damages to the effect that, if the plaintiff's negligence was equal to, or exceeded, that of the defendant, they must find for the defendant. The court, however, instructed the jury, in substance, that it was the duty of the jury to diminish or reduce the damages attributable to the defendant's negligence in proportion to the amount of negligence justly chargeable to the plaintiff, and if there should be any difference in favor of the plaintiff, after the damages were reduced to a money value, such difference should be the amount of their verdict. The instruction of the court was, in substance, a compliance with the federal statute on that subject, which requires that in case of contributory negligence it shall not be a defense, 'but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' Thus it will be seen that under that statute it is not a question of majority of negligence, but rather one of proportion. Any negligence of the defendant working injury to the plaintiff would therefore entail some damages. For illustration, let us suppose that both parties were equally negligent in the estimation of the jury, and that the actual damages of the defendant were properly assessable at \$2,000. In such a case the verdict should be for the plaintiff in the sum of \$1,000, for the reason that his negligence is one half of the sum total of all the negligence of both parties."

In an action under the employers' liability law, to recover damages for a personal injury, the jury as a basis for computation should first determine what sum of money would afford indemnity for the loss sustained, irrespective of the cause of hurt, and, if they find the employee was free from negligence at that time, and the defendant was guilty thereof, their verdict

should be in favor of the plaintiff for such sum. If, however, the employer and the employee were each negligent at the time of the injury, as found by the jury, they must compare the employer's negligence with that of the employee, and from such relative estimate determine the percentage of negligence properly chargeable to the employer, and such percentage, when ascertained in this manner, constitutes the proper part of the damages to which the plaintiff is entitled, and the verdict must be in his favor for such part or percentage of the sum agreed upon by the jury as indemnity for the loss sustained. If the jury concluded the employer was not negligent when the injury was received, their verdict should be in favor of the defendant.

Though the clause of the act under consideration uses the word "may," the jury must apportion the damages occasioned by a loss suffered by an injury to an employee when he and the employer have both been negligent in the manner indicated. Though the instruction complained of is subject to criticism, on the ground that it gave the jury an option whereby they might escape the duty devolving upon them, the language used should be construed with other parts of the charge on the same subject: *Wellman v. Oregon Short Line Ry. Co.*, 21 Or. 531 (28 Pac. 625); *Matlock v. Wheeler*, 29 Or. 64 (40 Pac. 5, 43 Pac. 867); *Wadhams v. Inman*, 38 Or. 143 (63 Pac. 11).

The court, in referring to Section 6 of the employers' liability law, further instructed the jury as follows:

"This law makes it incumbent upon you to compare the negligence, if you find both parties guilty of negligence contributing to or bringing about plaintiff's injury. If, therefore, you find that the defendant has been negligent in some manner as charged in the complaint and that such negligence contributed to plain-

tiff's injury, and you also find that plaintiff was guilty of negligence contributing to his own injury—and I have defined to you what facts would constitute such negligence—the negligence on the part of the plaintiff may be taken into account by you in mitigation or reduction of the damages that you might otherwise find for plaintiff."

It is believed that the use of the word "incumbent" in the part of the charge which stated to the jury, "The law makes it incumbent upon you to compare the negligence, if you find both parties guilty of negligence contributing to or bringing about plaintiff's injury," corrects any inference that might have arisen by the employment of the word "may" instead of "must." The instruction complained of was not contradictory, and the duty required of the jury was lacking only in degree.

It must be assumed that the jurors who tried this cause were intelligent men who fully understood the meaning of the English language and were able to comprehend the entire charge; and, since each juror signed the verdict when a less number, under our statute, might have determined the issues involved, we consider they were not misled by the instruction complained of, when viewed in connection with the entire charge, and that no error was committed as alleged.

Other errors are assigned, but they are deemed immaterial.

It follows that the judgment should be affirmed, and it is so ordered. AFFIRMED. REHEARING DENIED.

MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

MR. JUSTICE BURNETT dissenting.

Argued March 3, affirmed March 16, rehearing denied April 20, 1915.

NYE v. LINCOLN COUNTY BANK.

(146 Pac. 983.)

Appeal and Error—Findings of Court—Effect in Equitable Actions.

1. Where the evidence in an action to cancel a note and mortgage was in conflict, the findings of the trial judge were entitled to great weight.

Cancellation of Instruments—Note and Mortgage not Intended to Operate—Sufficiency of Evidence.

2. Evidence held sufficient to sustain plaintiff's contention that a note and mortgage given to defendant bank had not been intended by the parties to operate as such, but merely to serve the bank as an accommodation by apparently increasing its resources on examination by the state bank examiner.

Cancellation of Instruments—Evidence to Justify Relief.

3. To justify the cancellation of a note and mortgage on the ground that the instruments had been given as a matter of accommodation, and not to operate in their apparent character, the evidence must be clear and convincing.

From Lincoln: JAMES W. HAMILTON, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit by Frank Nye against the Lincoln County Bank, a corporation, to cancel a note and mortgage upon a quarter section of timber land in Lincoln County, Oregon, given by the plaintiff to the defendant, for want of consideration. The Circuit Court granted a decree in favor of the plaintiff. From this the defendant appeals.

The plaintiff alleges the following facts: In the fall of 1908 the plaintiff, Frank Nye, owned a valuable timber claim in the above-named county, worth approximately \$4,000. At that time the Lincoln County Bank and the Yaquina Bay Lumber Company were two closely allied institutions; the stockholders in each being practically the same. The bank was financing the lumber company, to which it had loaned about all

its funds. The officers of the bank feared that the bank examiner would take vigorous exception to this loan, for which they had taken inadequate security, and would commence proceedings to revoke the corporate charter of the bank for violation of the banking laws of the State of Oregon. For the purpose of covering up and concealing the above act, the officers induced Frank Nye to give the bank a note for \$2,000, secured by a mortgage on his timber claim, representing and declaring that they would use these instruments only to assure the bank inspector that a part of the indebtedness of the lumber company was, in fact, the obligation of Frank Nye, for which the bank did have ample security. They further represented to Nye that after the bank examiner had been satisfied, and the bank should be able to make a different disposition of its funds, the note and mortgage would be canceled and returned. Relying on these representations, plaintiff, Nye, wholly without consideration therefor, and purely as an accommodation to the bank, executed and delivered the instruments in question, which the bank now refuses to cancel and return. The answer denies these allegations, and alleges as a separate defense, in effect, that in the year 1910 the bank was reorganized, which involved practically an entire change in the stockholdings of the corporation and in its acting and managing officers; that the plaintiff knew of this, but never at any time asserted the alleged invalidity or lack of consideration for the mortgage, and by reason of his long neglect and laches in asserting the same, and because he permitted the mortgage to remain as an asset of the bank unquestioned for so long a time, he should be estopped from now claiming its invalidity or lack of consideration. The bank claims that coincidentally with the delivery of the mortgage the Yaquina Bay Lumber

Company issued to the plaintiff \$2,000 in amount of its capital stock, which was indorsed and delivered to the defendant bank by the plaintiff; that Nye purchased the stock from the lumber company, making arrangements with the bank to loan him the money for that purpose upon the security of the mortgage, with the stock as additional collateral, that upon the delivery of the note and stock the bank canceled \$2,000 in amount of the notes of the lumber company which it held. The reply put in issue the new matter of the answer.

Plaintiff, Frank Nye, testified in substance that in May, 1908, he was in the Lincoln County Bank, and Mr. Scarth, the owner at that time, told him that the bank was in bad shape by loaning too much money to the Yaquina Bay Lumber Company; that they had to get some more security from that company to make it look good to the inspector because their bank was incorporated for \$10,000 only, and they didn't like to let out more than \$2,500 to any one concern; and further, to quote from plaintiff's evidence:

"And he wanted to know of me if I would not give a mortgage to help secure this indebtedness of the Yaquina Bay Lumber Company so that it would look good to the bank inspector, and I told them I didn't know; and so it wasn't long afterward until he came over to the mill, and him and Atree asked me if I would not give them a note and mortgage, and that they needed the money to secure the bank, and I told them I would. He said there would be nothing dishonest nor out of the way about it, for they had other mortgages given the same way; and along in November, some time going to Newport, Mr. Scarth overtook me on the road and said he would like to have me give that mortgage in two or three days, and I told him I would. * * "

Plaintiff stated that they drew up the mortgage and brought it to him and he signed it. His testimony con-

cerning the return of the mortgage is as follows, in part:

"Q. And now after you gave them the mortgage did you ever have any conversation after that time with Mr. Scarth about the return of the mortgage?

"A. I told them afterward; I asked them about it, and he told me he would not return it. * * He said that he had the best of me, and he had things fixed up in shape so I could not get it.

"Q. Say you were stuck?

"A. Yes; I was stuck, and the Yaquina Bay Lumber Company looked after their business affairs and I had ought to have looked after mine. * * "

Nye further testified:

"I asked him about two years ago over by his house, and he told me he would not do it. * * He said he had the best of me; had my stock and he would keep it. * * I told him I would sue him for it, and he said, 'Go ahead'; it would not do any good."

Plaintiff said that he never received anything from the bank in the way of a loan; that Mr. Scarth told him at the time of giving the mortgage he would return the same in two years.

On cross-examination this witness stated:

"A. After I signed this mortgage they told me to come over to the bank, that they wanted to draw up some shares for the Yaquina Bay Lumber Company and sign over to me, so to make it look good to the bank.

"Q. Did you take those shares?

"A. I let them keep them; they wanted to keep them, so as to make it look good to the bank inspector, and they would give the mortgage back to me."

Upon being shown the certificate of stock, plaintiff said:

"Yes; that is what they wanted me to sign, so as to make it look good to the bank inspector so they could turn over this mortgage. * * "

It appears that Nye had been working in the mill for a long time, and was friendly with the officers of the bank, who often went to the mill to tell him what they wanted done, and that at one time he borrowed \$50 from the bank. According to plaintiff's statements, Scarth told him that he would have some money of his own, and would let the mortgage loose in a little while; that at the end of the year Scarth asked him to pay interest on the note, and he told him he had nothing to pay it with; that Scarth said he would give it to him when he turned the note back; that Mr. Scarth went out of the bank about two years ago. On redirect examination Nye stated that he never bought any stock in the lumber company; that in about four or five days after the mortgage was given he asked Scarth when he would return the mortgage and how long he would need it, and he said, "For two years." Plaintiff testified:

"Oliver Atree drew up a check to me and wrote on the check and said, 'Interest on the mortgage,' and told me and Scarth said to me if I would give him this check he would give the money back to me."

He stated that the check was for \$150. It appears that Nye was brought up on a ranch, and had never done business for himself. J. C. Atree, an employee of the lumber company, testified that he and his brother Oliver gave a mortgage for \$2,000 to the bank under similar circumstances, and with the understanding that it was to be given back. W. Scarth, cashier of the Lincoln County Bank for some years, testified as follows:

"I notified Mr. Altree that the indebtedness of the Yaquina Bay Lumber Company was too much for us to carry, and for him to make some arrangement to cut that down or give the bank security to cover the same, and he said he could sell the stock of the mill company to Mr. Nye and to his brother, and I told him to go ahead and sell the stock, and then he brought them in, and they gave mortgages on the timber claims, and the stock was turned over to them, and then assigned back to the bank to hold as collateral security for the mortgages. * * I have never spoken, that I can remember, to Nye at all, except that evening in the bank they gave the mortgages. * * I don't remember whether they [the mortgages] were executed that night or not. I don't think so, though. * * I told him [Nye] if he ever did ask me that the notes and mortgage would be given back when he would pay for it. * * I never promised to give the mortgage up at any time until it was paid.

"Q. Did you ever tell Mr. Nye that you wanted this note to show the bank examiner, to make things look right or anything of that kind?

"A. No, sir.

"Q. What is the fact about that?

"A. I told him the Yaquina Bay Lumber Company's indebtedness to us under the new state law was too great.

"Q. Who did you tell that?

"A. Mr. Altree.

"Q. Did you ever tell Mr. Nye that?

"A. I haven't any recollection of ever telling Mr. Nye that."

Mr. Scarth stated that he held 20 shares of stock in the Yaquina Bay Lumber Company until 1908, up to which time he was on the board of directors. On cross-examination he testified the lumber company's indebtedness to the bank to be about \$25,000. The following testimony also appears:

"Q. Well, now, how is it, Mr. Scarth, that you claim this mortgage was taken; what do you claim the bank gave Mr. Nye as consideration for the mortgage?

"A. The bank gave Mr. Nye nothing as consideration for the mortgage; gave him cash.

"Q. Gave him cash?

"A. Well, gave him a check.

"Q. For how much?

"A. For \$2,000.

"Q. For \$2,000?

"A. If I remember, that is how the transaction was done.

"Q. When was that check given?

"A. That same day; that same evening.

"Q. And that check, I suppose, was cashed by Mr. Nye?

"A. No; he got the stock for that of the Yaquina Bay Lumber Company.

"Q. It was the check of the bank?

"A. I don't remember that quite, but I know he got the stock of the Yaquina Bay Lumber Company.

"Q. Let's come back to the check; you say \$2,000 was given to Mr. Nye by check, and that check in the course of the bank business—

"A. I think it was given by check; I don't remember.

* * I think he got a check, but I know he got stock of the lumber company for the mortgage; that was the consideration of the mortgage, the stock in the lumber company.

"Q. The stock in the lumber company?

"A. Yes; he was buying stock of the lumber company and the bank advanced him the money on his mortgage to buy this stock. * * I think the bank just credited the lumber company with \$2,000. * *

"Q. If the bank or Mr. Nye was buying the stock of the lumber company, why didn't he pay the lumber company or give his note to the lumber company?

"A. No answer. * *

"Q. And this mortgage was due in 1910, and the interest has not been paid except for the first year, ac-

cording to your version; why hasn't the bank foreclosed?

"A. It has not seen fit to. * *

"Q. You say Mr. Nye never claimed to you at any time that the note and mortgage was invalid?

"A. Never, that I can remember."

Mr. Thomas Lees testified in part that the lumber company's indebtedness to the bank was very heavy, and that he advised Mr. Scarth to get it cut down; that he never talked with Mr. Nye; that he held stock in the company as protection to the bank so they could control the business. G. B. McClusky, the notary public who certified to the acknowledgment of the mortgage by Nye, testified that he had no remembrance of taking an acknowledgment of such mortgage. C. E. Hawkins, president of the bank, stated that the plaintiff made no claim of defense to him; that he was a director when the mortgage was given; that he did not want to foreclose, because he would probably have to bid it in. Plaintiff, Nye, was recalled, and testified that he never made any claim for mortgage to Mr. Hawkins; that he made claim to Mr. Scarth, supposing he was still connected with the bank; that Scarth wanted him to go security for the bank, but that he never asked him to buy stock in the company; that Mr. Oliver Altree, the president, never asked him to buy any stock; that the stock certificate was assigned to him two or three days after the mortgage was given.

The trial court heard the witnesses, and found that the note and mortgage were executed to defendant wholly without consideration; that defendant, through its officers, procured plaintiff to execute the note and mortgage in order that it might make a more satisfactory showing to the bank examiner of the State of Oregon with reference to the indebtedness to defend-

ant of the Yaquina Bay Lumber Company, and the defendant promised to return to plaintiff said note and mortgage; that plaintiff was at said time a laborer in the employment of the Yaquina Bay Lumber Company, and was influenced so to do by the officers of defendant and the Yaquina Bay Lumber Company, which officers were acting together to secure plaintiff to execute the note and mortgage. As a conclusion of law, the court found that the plaintiff's act, being largely induced by the influence exercised by his employers, does not render him a participant in the wrong committed by the defendant in the use made by it of the note and mortgage, to the extent that equitable relief should be denied.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. C. E. Hawkins* and *Messrs. Woodcock, Smith & Bryson*, with an oral argument by *Mr. E. R. Bryson*.

For respondent there was a brief over the names of *Mr. Ralph R. Duniway*, *Mr. C. E. Whealdon* and *Mr. J. F. Stewart*, with oral arguments by *Mr. Duniway* and *Mr. Whealdon*.

MR. JUSTICE BEAN delivered the opinion of the court.

1-3. The case depends largely upon questions of fact. The evidence is conflicting. The main facts are testified to upon one side by Frank Nye, plaintiff, and upon the other by Mr. Scarth, the former cashier of the defendant bank. Under such conditions the findings of the decision of the trial judge who heard the witnesses and observed their demeanor upon the stand are entitled to great weight: *Scott v. Hubbard*, 67 Or. 498 (136 Pac. 653); *Hurlburt v. Morris*, 68 Or. 259 (135 Pac. 536). A reading of the evidence convinces

us that the conclusions of the trial court are correct. The proof meets the requirement contended for by defendant's counsel that, to justify a cancellation of the note and mortgage, the evidence should be clear and convincing: 3 Jones, Evidence, § 447; *United States v. Maxwell Land Grant Co.*, 121 U. S. 325 (30 L. Ed. 956, 959, 7 Sup. Ct. Rep. 1015). The substance of Mr. Scarth's evidence is to the same effect as shown upon the face of the note and mortgage and the certificate of stock, and goes but little further. He states, in effect, that he does not remember in regard to the details as testified to by the plaintiff. The condition of the bank at the time the mortgage was executed was admittedly as asserted by the plaintiff. Nye is corroborated as to some circumstances by J. C. Altree. If Mr. Oliver Altree, the president of the Yaquina Bay Lumber Company, obtained the mortgage from the plaintiff as security for the lumber company, he did not appear as a witness to such a fact. Neither is any reason given for defendant not producing such witness. It appears that the plaintiff was led to believe that he was executing the note and mortgage as an accommodation to the defendant bank. The claim of the defendant that shares of stock in the Yaquina Bay Lumber Company were sold to the plaintiff, and that the note and mortgage were given on account thereof, is not sustained by the proof. The plaintiff, a laborer in the mill in which the defendant bank was largely interested, at least to the extent of a loan of \$25,000, was induced by the importunities of the officer of the bank aided by the officer of the mill company to execute the note and mortgage with a promise that it would be returned to him by the bank. In equity and honest dealing the note and mortgage should be canceled and returned to the plaintiff: 1 Story, Equity Juris. (13 ed.), § 188.

The decree of the Circuit Court provided that the stock of the Yaquina Bay Lumber Company claimed to be held by defendant as additional security for the \$2,000 loan be returned to the secretary of the Yaquina Bay Lumber Company freed from any claim of the defendant. The defendant should be allowed, if it desires, to retain the certificate of stock as security for any sum due it from the lumber company. The decree of the lower court will be changed in this respect, without modification as to costs. The decree canceling the note and mortgage is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON CONCUR.

Submitted on briefs without argument April 14, affirmed April 20, 1915.

STATE v. BOYSEN.

(147 Pac. 927.)

Witnesses—Competency—Grand Juror.

1. Section 1427, L. O. L., declares that a grand juror cannot be questioned for anything he may say or any vote he may give while acting as such, except for a perjury of which he may have been guilty, while Section 1431 prohibits the disclosure of facts by a grand juror. *Held*, that, in a criminal prosecution, it was not error to permit a grand juror to testify that accused was examined before the grand jury.

[As to grand jurors as witnesses, see note in 12 Am. St. Rep. 915.]

Intoxicating Liquors—Offenses—Statutes—Constitution.

2. The home rule amendment of 1906 to Section 2, Article XI, of the Constitution, whereby municipalities were authorized to prepare their own charters subject to the Constitution and criminal laws of the state, did not abrogate Section 2142, L. O. L., providing that one who sells liquor to a minor shall, upon conviction, forfeit his license, so as to permit a city to authorize a violation of that law.

From Clackamas: JAMES U. CAMPBELL, Judge.

The defendant, Fritz Boysen, was indicted, tried and convicted of illegally selling intoxicating liquor to a minor, and from the sentence imposed he appeals.

Submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the names of *Mr. George C. Brownell* and *Mr. John F. Logan*.

For the State there was a brief submitted by *Mr. Gilbert L. Hedges*, District Attorney.

In Banc. MR. JUSTICE EAKIN delivered the opinion of the court.

The defendant, at the time herein mentioned, held a license for the sale of intoxicating liquors in Milwaukee, Clackamas County, Oregon, an incorporated city. He was indicted for giving and selling liquor to a minor in violation of the statute. He was tried and convicted of the charge and adjudged to pay a fine of \$150; and in default thereof he was to be confined in the county jail for the period of 75 days and his license forfeited.

1. Only two errors are assigned. The first was against the state's being permitted to call as a witness the foreman of the grand jury that found the indictment. The only evidence given by the witness was to the effect that the prosecuting witness was before the grand jury, and that the grand jury brought in a true bill against the defendant; but this testimony included no facts affecting the case. Defendant's contention is that it was an attempt to bolster up the testimony of a prosecuting witness, but there is nothing prejudicial or in violation of the statute contained in the evidence

given by the witness. The only statutory injunction against the calling of a grand juror as a witness is Section 1427, L. O. L., to the effect that he cannot be questioned for anything he may say or do while acting as such, except for a perjury, etc. No grand juror may disclose any fact concerning such indictment which is not subject to public inspection: Section 1431, L. O. L. But it is not plain that the indictment was not subject to public inspection at the time the witness was called. Section 1427 is for the protection of grand jurors, and Section 1431 is for that of the court; and there is nothing contained in the evidence given by the witness that is in violation of either of these sections

2. The second assignment is that the court erred in attempting to forfeit the license of the defendant. In rendering judgment against the defendant, the court forfeited his license under Section 2142, L. O. L., which provides:

“If any person shall sell, give, or cause to be sold or given, any intoxicating liquor to any minor in this state * * upon conviction thereof shall be punished by a fine of not less than \$50 nor more than \$300, * * and shall also forfeit any license such person may have to sell spirituous or intoxicating liquors in less quantities than one gallon.”

It is not optional with the city to authorize a violation of this statute. This was expressly held in *State v. Horton*, 21 Or. 83 (27 Pac. 165). Defendant urges that the home rule amendment of Article XI, Section 2 of the Constitution repeals or nullifies Section 2142, L. O. L.; that by this amendment the City of Milwaukee was given exclusive power to license the defendant to sell liquor; and that this is in accordance with *Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594). The power given by that amendment of the Constitution is limited by the

requirement that it shall be subject to the Constitution and criminal laws of the state, even though it reads, "The voters of every city and town are hereby granted exclusive power to license," etc. The amendment of 1906 is held to be subject to the exception of Article XI, Section 2, which controls in cities where it is made applicable: *Baxter v. State*, 49 Or. 353 (88 Pac. 677, 89 Pac. 369). In *State v. Schluer*, 59 Or. 18 (115 Pac. 1057), this very amendment of the Constitution was under consideration, and the court held that *Baxter v. State* was *stare decisis* as to this question; and *Kalich v. Knapp*, 73 Or. 558 (142 Pac. 594), is not to the contrary.

The judgment is affirmed.

AFFIRMED.

Argued April 12, affirmed April 20, 1915.

STATE v. CANTON.

(147 Pac. 927.)

Witnesses—Re-examination—Explanation of Testimony.

1. It is competent for the state to explain a transaction called out by defendant on the cross-examination of a witness.

Criminal Law—Instructions—Accomplices—Corroboration.

2. A charge that the evidence, aside from the testimony of an accomplice, must show defendant's connection with the commission of the crime is correct, though it does not include the provision of Section 1540, L. O. L., that corroboration is not sufficient if it merely show the commission of a crime.

[As to whether conviction may be based upon the uncorroborated testimony of accomplices, see notes in 71 Am. Dec. 671; 34 Am. Rep. 408; 98 Am. St. Rep. 158.]

Witnesses—Competency—"Unsound Mind."

3. A weak-minded degenerate is not a person of "unsound mind," prohibited from testifying by Section 731, L. O. L., and his testimony, admitted without objection, will not be rejected.

[As to admissibility of evidence of insane witness, see notes in 28 Am. St. Rep. 942; 128 Am. St. Rep. 942. As to competency of insane person as witness, see note in Ann. Cas. 1913E, 323.]

From Jackson: FRANK M. CALKINS, Judge.

The defendant, W. J. Canton, was indicted, tried and convicted of the crime of sodomy, and from the judgment and sentence imposed he appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Benjamin F. Mulkey* and *Mr. W. J. Canton*, with an oral argument by *Mr. Mulkey*.

For the State there was a brief over the names of *Mr. E. E. Kelly*, District Attorney, and *Mr. Isaac H. Van Winkle*, Deputy Attorney General, with an oral argument by *Mr. Van Winkle*.

Department 1. MR. JUSTICE EAKIN delivered the opinion of the court.

The defendant was indicted for the crime of sodomy, by osculation, alleged to have been committed upon the person of Richard Coffman, and, having been convicted as charged, he appeals.

Three grounds of misapplication of the law, relied on for reversal, are as follows:

"I. The court erred in permitting the witness John Opp for the state on redirect examination, over the objection of appellant, to state that the witness Richard Coffman told him and the district attorney the details of the crime alleged in the indictment, 'about the same as he [Richard Coffman] stated here,' at a time when the appellant was not present.

"II. The court erred in instructing the jury upon the corroboration required by statute of the testimony of an accomplice.

"III. The court erred in overruling defendant's motion to set aside the judgment and sentence, and to grant a new trial of said cause."

1. John W. Opp, a witness for the state, on cross-examination by defendant's counsel was interrogated and gave answers as follows:

"Q. So you went with Mr. Kelly [the district attorney] out on Griffin Creek to see the boy, did you?

"A. Yes, sir.

"Q. Now, then, the boy was seen by you too that day and talked to. How long did you talk to the boy?

"A. Why, probably 20 minutes or a half hour.

"Q. Did you have any difficulty in getting it out of the boy what he had seen?

"A. Not at all.

"Q. Tell a pretty consistent story?

"A. He did.

"Q. You heard him testify a while ago?

"A. I did.

"Q. As consistent as that?

"A. No, much more consistent than that.

"Q. And you went with Mr. Kelly out there for the purpose of seeing about it?

"A. Well, I went with Mr. Kelly. He insisted upon me going."

On redirect examination by Mr. Kelly, the district attorney, the following occurred:

"Q. Mr. Opp, you were present when the Coffman boy was talking about these details?

"A. Yes, sir.

"Q. Did I, or you, or any other person, suggest to him what occurred there?

"A. No, sir.

"Mr. Mulkey (Defendant's Attorney): Objected to as incompetent, irrelevant and immaterial.

"The Court: He may investigate.

"Mr. Kelly: You opened that up, and we think we have a right to go into it.

"Mr. Mulkey: I mean as to what was said. We object to what was said.

"The Court: There hasn't been anything offered with reference to anything that was said. He asked him if he tried to induce him to say anything.

"Mr. Mulkey: Oh, I thought he asked what was said.

"Q. Did you make any suggestion to him as to what happened there?

"A. No, sir.

"Q. Did I make any suggestion to him as to what happened there?

"A. No, sir. You did not.

"Q. Who was present?

"A. You called in his father. Do you want me to state what—

"Q. Yes.

"A. You called in his father and asked him. Said that there was a little matter you wished to talk to him about in regard to his boy, and so he called in the boy, and the boy hesitated to tell what had happened, and his father says, 'Go on and tell the truth about it'; and the boy went on and stated about the same as he stated here.

"Q. Was there ever any suggestion made or leading question put to him?

"A. Absolutely none. Not a particle of any kind."

No further objection was made than is here given. It will be seen that all this testimony was in direct response to what was brought out in cross-examination. No error was committed in admitting the testimony complained of. Counsel will not be permitted to call out part of a transaction and then allowed to object to matters explaining it. In fact, it is difficult to see how anything that was said by the witness could have injured the defendant.

2. The court gave this instruction, which was excepted to:

"Now, some of the evidence here is given by one whom the law terms an 'accomplice' (that is, Richard Coffman); and I will say to you that the law requires corroborative proof (that is, you could not accept the evidence of Richard Coffman alone and find the defendant guilty upon that evidence, but you must be satis-

- fied by other evidence offered in the case, aside from that of Richard Coffman, that will convince your mind, beyond a reasonable doubt, that this defendant was connected with the commission of the crime as charged). * * Now, there is one other instruction that I omitted to give you, and that is in regard to the evidence of an accomplice. The law requires that the jury should view the evidence of an accomplice with caution. That doesn't mean that you are to entirely disregard it, but you are to scrutinize it carefully."

Section 1540, L. O. L., is as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime, or the circumstances of the commission."

The objection counsel makes to this instruction is that it does not include the latter part of the section of the statute quoted—that "the corroboration is not sufficient if it merely show the commission of the crime." We think this objection is not well taken. The instruction directly told the jury:

"You must be satisfied by other evidence offered in the case, aside from that of Richard Coffman, that will convince your mind, beyond a reasonable doubt, that the defendant was connected with the commission of the crime as charged."

This certainly avoids the contention of counsel as to the necessity of charging the jury that this corroborative testimony is not sufficient if it merely shows the commission of the crime. But the jury were distinctly told that the evidence must show the defendant's connection with the commission of the crime. We think this instruction amply states the law and is in full compliance with the adjudicated cases.

3. The principal contention of defendant is founded on his motion for a new trial, interposed after sentence had been pronounced. He asked the court to set aside the verdict and to grant a new trial for the reason that Coffman was of unsound mind. To support this controversy, the defendant filed his own affidavit to the effect that he did not know of this mental impairment until after the trial. The defendant's affidavit is accompanied by the sworn statements of two physicians to the effect that the witness Coffman was of unsound mind. This question was not raised at all during the trial. It appears from the defendant's own testimony that he met Coffman on the streets, engaged him to go out and show the location of a mine, and that the boy started with him, and in making the journey Coffman states the act complained of occurred. The defendant heard the boy testify in the justice court at the preliminary examination and on the trial in the Circuit Court. After his conviction Canton asserts he was told by a physician that Coffman was of unsound mind, but that the defendant did not sufficiently suspect the boy's mental infirmity so as to make him raise the question at the trial. If Coffman did not give signs of mental unsoundness in all these proceedings sufficient to put the defendant on inquiry as to his condition of mind, he was undoubtedly a competent witness. Section 731, L. O. L., provides that:

"All persons without exception, except as otherwise provided in this chapter, who, having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses."

The next section provides that persons of unsound mind are not competent witnesses. While it is not necessary, in this case, to construe these sections of the

statute strictly, we apprehend that a witness, who can go through the two examinations to which Coffman was subjected, and especially the one as long and severe as the trial herein, without disclosing unsoundness of mind, is a competent witness. That he is weak-minded appears from a perusal of his testimony, but this intellectual condition is not the "unsoundness of mind" which is meant by the statute. In deciding this motion, the learned judge of the court below said:

"The only basis for granting a new trial in this case is the statement in defendant's affidavit that he did not know, at the time of trial, the mental condition of witness Coffman. Defendant has made a part of his motion all of the files and proceedings had upon the trial. It appeared at the trial that witness Coffman was a witness at the preliminary hearing, and was cross-examined fully by defendant. It also appears from the testimony of defendant that he accompanied the witness on the day of the alleged offense, and at that time the witness disclosed his mental condition. The witness was examined and cross-examined fully at the trial, and it is impossible to comprehend how any one hearing that examination could be ignorant of the witness' mental condition. It was also stated at the hearing of the motion, and not denied, that defendant and his counsel discussed the advisability of objecting to the witness' evidence on the ground of unsoundness, and that defendant decided not to raise the question. It was apparent at the trial that witness was not an insane person but a mental degenerate. What occurred at the time the oath was administered was sufficient to put defendant upon notice of the witness' mental limitations. And after the close of his testimony no motion to strike was offered. It must be presumed that defendant was satisfied to have his evidence go to the jury, and he cannot take one course at the trial, and, when the results are unsatisfactory, ask to take another position, for new trial. I find no error sufficient to warrant a new trial of the case."

That this witness was a degenerate is certain, else this case would not be here. But he was a competent witness, and his testimony could not have been rejected upon that ground. If his statements made upon oath stood alone a conviction obtained on them ought not to stand, but he is so strongly corroborated by the testimony of John W. Opp, who witnessed so much of the transaction as to make the sworn declarations of Coffman almost a demonstration. Mr. Opp appears to have been a fair, intelligent and unbiased witness, and his testimony is entitled to full credit. This objection came too late to be considered, but was so strenuously pressed by counsel for defendant that we have taken the pains to examine it, and we find no ground to disturb the judgment of the court below.

It is therefore affirmed.

AFFIRMED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and
MR. JUSTICE BURNETT CONCUR.**

Argued April 1, modified and affirmed April 20, 1915.

PIERCE v. PARKS.

(147 Pac. 929.)

Executors and Administrators—Necessity of Administration—Lien on Land—Rights of Heirs.

1. Where plaintiff's father conveyed land to him on the condition that he should pay \$600 to his brother when the latter became 21 years of age, charging the amount as a lien on the land, and authorizing the lien to be foreclosed for failure of payment, the fact that such brother died previous to attaining his majority, without letters of administration being taken out on his estate, did not divest the claims of his heirs to the amount of \$600 secured by the land.

Limitation of Actions—Maturity of Obligation.

2. Where a father conveyed land to his son, charging it with a lien to secure the payment by the grantee of \$600 to his brother,

when the beneficiary should reach his majority, and such beneficiary died before he attained such age, his previous death could not hasten the maturity of the debt to initiate the period of the statute of limitations.

Payment—Sufficiency of Evidence.

3. In an action to reform a deed and to determine whether plaintiff, to whom his father had granted land charged with the payment of \$600 to his brother when the latter should reach his majority, was liable to the brother's heirs for the amount, evidence held insufficient to show payment of such amount to the father as such heir.

From Coos: JOHN S. COKE, Judge.

This is a suit by Frank A. Pierce against Bertha F. Parks, and her husband, William W. Parks, Eva M. Wood, and her husband, James J. Wood, Clara J. Houser, and her husband, James Houser, Edna M. Duckett, Emmet L. Pierce, and also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint herein. There was a decree in favor of plaintiff and defendants appeal. MODIFIED AND AFFIRMED

For appellants there was a brief over the names of *Mr. Walter Sinclair* and *Mr. J. O. Stemmler*, with an oral argument by *Mr. Sinclair*.

For respondent there was a brief over the names of *Mr. A. J. Sherwood* and *Mr. Lawrence A. Liljeqvist*, with an oral argument by *Mr. Sherwood*.

Department 2. MR. JUSTICE EAKIN delivered the opinion of the court.

Plaintiff seeks to reform the deed from John C. Pierce and wife, which they executed to F. A. and Emmet L. Pierce on the 5th day of March, 1891, describing the property conveyed as "the east half and the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, of sec-

tion 21, township 26 south, range 11 west, Willamette Meridian," to read "the east half of the northwest quarter, the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, of section 21, township 26 south, range 11 west, Willamette Meridian." We find that the deed describes the property sought to be designated by the reformation, which indicates that there was no error in the original deed; but, as both the plaintiff and the defendants admit the error in the deed and consent to the reformation, we will make no objection and grant the change as requested.

1, 2. The main controversy in this case relates to the requirement provided in the deed that the grantees therein should pay \$600 to Jesse Cleveland Pierce, a son of the grantors, when the said Jesse Cleveland Pierce should have attained the age of 21 years, the said \$600 to be a lien upon the premises conveyed until paid. The record and evidence show that Jesse Cleveland Pierce was born on the 30th day of June, 1887, and died on the 9th day of November, 1893; that John C. Pierce died on the 17th day of July, 1903, and Orion Pierce died in the month of April, 1912. The said \$600 not having been paid during the lifetime of the said Jesse Cleveland Pierce, it will be seen that John C. Pierce was his heir and inherited the said \$600. Upon the death of John C. Pierce, his wife, Orion Pierce, was entitled to receive one half of his personal property. The record fails to show any administration of the estate of Jesse Cleveland Pierce, of the estate of John C. Pierce, or of the estate of Orion Pierce. Failure to have an administration of the estate of Jesse Cleveland Pierce would not operate to cut off the claim of his heirs against his estate for the said \$600, because it was made a lien upon the land and

authorized by the deed to be foreclosed in a court of competent jurisdiction; but the defendants should have alleged the interest of Orion Pierce in the personal estate of said John C. Pierce, and that she had not received it or expended it in her lifetime. There were six children of the grantors, Bertha F. Parks, Clara J. Houser, Edna M. Duckett, Eva M. Wood, Emmet L. Pierce and Frank A. Pierce, who would inherit equally the remnant of the estate of John C. Pierce. The defendants Bertha F. Parks and Clara J. Houser, two of said children, set up the lien of \$600 in favor of themselves to the exclusion of the other heirs which at least is an irregularity. The defendants in a reply recite the fact that the said \$600 was wholly paid to John C. Pierce during his lifetime, being expended principally for his care during his last illness. The only testimony in relation to the payment of that \$600 to John C. Pierce was the testimony of Frank A. and Emmet L. Pierce. Defendants also pleaded the statute of limitations, claiming that the debt was barred thereby at the time of the commencement of this suit. There is no dispute in regard to the lien created in favor of Jesse Cleveland Pierce for the said sum of \$600; and the only issue at this time is as to when it matured. Jesse Cleveland Pierce, if he had lived, would have been 21 years old on the 30th of June, 1908; and if the debt did not mature until the time that he would have been 21 years of age, it would not be barred by such statute at this time. If it had matured on the death of Jesse Cleveland Pierce November 9, 1893, which is the contention of plaintiff, it would have been barred 6 years from that date; but the deed fixes a definite time at which it shall mature, that is, at the time Jesse Cleveland Pierce will be of age, and the fact

that he died previously to that time cannot hasten the maturity of the debt.

3. Frank A. Pierce, testifying as to the payments, says he cannot give the exact dates or the amounts of the payments; that the payments continued along until nearly the date of his father's death. He continues, "My best recollection is that the most that I ever paid my father at one time was \$180." That is the only payment to which he testifies definitely as having been made. Emmet L. Pierce says that the \$600 was not paid to his father all at one time; that he paid him during his illness more than \$600, but that he did not keep an exact account. He does not give the date or amount of any definite payment at any certain time; and this is not such proof of payment as the law requires. He testifies that he thinks he paid him nearly twice the amount of the debt, but such proof is not sufficient to establish payment.

Giving plaintiff credit upon the \$600 for the \$180 which he says he paid at one time, there would still be \$420 due on June 23, 1908, of which defendants Bertha F. Parks and Clara J. Houser would be entitled to two sixths, or \$140, with interest from June 23, 1908, at 6 per cent per annum.

The judgment is modified and defendants awarded \$193.70, and a decree foreclosing the lien created by said deed in the manner provided by law and applying the proceeds of the said sale to the payment of the said \$193.70. The decree is affirmed as to the reformation of the deed.

MODIFIED AND AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Argued April 14, affirmed April 20, 1915.

STATE v. LEVY.

(147 Pac. 919.)

Statutes—Title—Sufficiency.

1. The title of Laws of 1913, page 143, entitled "An act to regulate and license * * the business of commission merchants * * and to require them to give a bond * * for the benefit of their consignors and prescribing a penalty for the violating of any of the provisions in this act," is not sufficient within Article IV, Section XX, of the Constitution, providing that every act shall embrace but one subject, and matters properly connected therewith, which shall be expressed in the title, to justify provisions in the body of the act conferring on the State Railroad Commission power to require from the merchants statements of their business and to revoke licenses for cause on notice and hearing; and, where these provisions are a dominant feature of the act, the entire act is invalid.

[As to title of statutes, when sufficient, see note in 64 Am. St. Rep. 70. As to title of statutes when embrace but one subject and what may be included thereunder, see note in 79 Am. St. Rep. 456. As to effect of provisions requiring statutes to embrace but one subject, which shall be expressed in the title, see note in 61 Am. Dec. 337. As to validity of statute having title more comprehensive than act itself, see note in Ann. Cas. 1912a, 102. As to validity of statute providing penalty or punishment not mentioned in title, see note in Ann. Cas. 1912D, 157.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

B. H. Levy and J. J. Cole were jointly charged in the District Court of Multnomah County with engaging in the business of a commission merchant, in violation of the provisions of Chapter 88 of the Session Laws of 1913. They were convicted and sentenced to pay a fine of \$25 each. Upon appeal to the Circuit Court a demurrer to the complaint was sustained, and the action dismissed. From this judgment, the state appeals.

AFFIRMED

For the State (appellant) there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, and

Mr. George Mowry, Deputy District Attorney, with an oral argument by *Mr. Mowry*.

For respondent there was a brief over the name of *Messrs. Reed & Bell*, with an oral argument by *Mr. Sanderson Reed*.

MR. JUSTICE BENSON delivered the opinion of the court.

Defendants, in support of their demurrer, contend that the act upon which the prosecution is based violates the Constitution of Oregon in several particulars, and the validity of the statute is the sole question submitted upon this appeal. The title of the act reads as follows:

“An act to regulate and license and define the business of commission merchants or persons selling horticultural produce and farm products on commission and to require them to give a bond to the State of Oregon for the benefit of their consignors and prescribing a penalty for the violating of any of the provisions of this act.”

Section 1 reads as follows:

“For the purposes of this act a commission merchant is defined to be a person, firm or corporation whose principal business is the sale of farm, dairy, orchard or garden produce on account of the shipper or consignor, or solicit consignments of any character. No person shall sell or receive or solicit consignments, of such commodities for sale, on commission without first obtaining a license from the State Railroad Commission to carry on the business of a commission merchant and executing and filing with the Secretary of State a bond to the state for the benefit of his consignors; the amount of the bond to be fixed and sureties to be approved by the commission, who may increase or reduce the amount of the bond from time to time.”

The other sections authorize the Railroad Commission to require from the merchant statements of his business, to revoke his license for cause upon notice and hearing. It is observed, however, that the statute is silent as to the nature of the notice or the party served. The act further provides that the commission may, after investigation, cancel the license for any violation of law or conduct prejudicial to the interests of those making consignments, and declares certain acts of omission and commission, upon the part of the merchant, to be a felony. It will be noticed that, while commission merchants are a class by themselves, those whose principal business is selling such products on commission constitute but a part of the class. The statute makes the State Railroad Commission a tribunal with extraordinary powers, although the title of the act gives no hint of such provision.

Article IV, Section 20, of the state Constitution, provides that:

“Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.”

Commenting upon this provision in the case of *Clemmensen v. Peterson*, 35 Or. 48 (56 Pac. 1016), Mr. Chief Justice WOLVERTON says:

“The purpose of this clause of the Constitution is well understood, and it was adopted to prohibit the legislature from combining in one act subjects wholly incongruous, diverse in their nature, and having no perceptible or necessary connection with each other, and to obviate the practice of inserting in an act clauses involving matter of which the title is not calculated or adequate to give or convey any intimation. Thus, it was designed by the framers of the Constitution that in every case the proposed measure should

stand upon its own merits, and that the legislature should be fairly satisfied of its purpose by an inspection of the title, when required to pass upon it, so as not to be surprised or misled by the subject which the title purported to express. ”

This view is quoted with approval by Mr. Chief Justice BEAN in the case of *Spaulding Logging Co. v. Independent Imp. Co.*, 42 Or. 397 (71 Pac. 132). Applying this test to the act under consideration, we see at a glance that the powers granted to the Railroad Commission are a vital and dominant feature of the statute, yet the title is wholly silent in relation thereto, and the act is clearly in violation of the constitutional provision referred to. There are other particulars in which the statute is subject to grave criticism, but we deem it unnecessary to consider them.

The judgment of the lower court is affirmed.

AFFIRMED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE MCBRIDE concur.**

Argued April 13, affirmed April 20, 1915.

LOVE v. LINDSTEDT.

(147 Pac. 935.)

Wills—Estates—Interest Devised.

1. Where a testator, after devising property in fee, added a codicil, declaring that the devise should be for the sole and separate use of the devisee, and that in case of his death without lawful issue, to others, the devisee took a life estate with remainder over.

Wills—Contingent Remainders—What are.

2. Where a testator devised property to one for life, remainder to his issue, and in case of his death without issue remainders over, the issue of the devisee have a contingent remainder, because the fee could only vest in them if they survived him.

Remainders—Contingent Remainders—Conveyances.

3. One having a contingent remainder may convey it.

[As to contingent remainders, how barred, defeated or conveyed, see note in 17 Am. St. Rep. 839.]

Wills—Construction—Contingent Remainders and Executory Devises.

4. A future estate will be construed as a contingent remainder rather than an executory devise.

Remainders—Contingent Remainders—Defeat.

5. Where a testator devised land to his son for life, remainder to the son's issue, with contingent remainders over, and the issue of the son, who were living, as well as other contingent remaindermen, conveyed their interest to the devisee, the devisee acquired the estate in fee, contingent remainders to unborn persons being defeated because the life estate upon which they were based was destroyed.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is a suit by Green C. Love against Edwin Lindstedt to compel specific performance of a contract to purchase land. The complaint alleges, in substance, that in October, 1914, plaintiff and defendant entered into a contract whereby plaintiff agreed to sell, and defendant to purchase, lots 7 and 16 in block 5, in Green C. Love's Addition to the City of Portland, for the sum of \$1,650, to be paid November 7, 1914, upon the payment of which plaintiff was to execute to defendant a deed to the premises; that plaintiff has at all times been ready, able and willing to execute said deed, but that defendant refuses to accept it and to pay the purchase price, alleging as his sole reason therefor that plaintiff has not a marketable title in fee simple to said property. The complaint then sets forth at length plaintiff's chain of title, from which it appears that the land in question is a portion of a tract originally patented by the United States to Lewis Love, who in 1903 died seised of the property, bequeathing it by a will and codicil, the material parts of which will are substantially as follows:

"It is my purpose to will at this time all of my property, personal, real and mixed, to my legal heirs in the same proportion as the law would convey the same to them in the absence of any will by me reserving only the burial place where my wife is now buried and a strip of land two feet in width adjacent thereto on the west, north and east of said burial spot; and I hereby set aside said burial place and said two feet of land adjacent thereto forever as a resting place or burial spot for my wife and myself; said burial place joins Columbia Cemetery on the northwest corner, which said cemetery is in section 10, township 1 north of range 1 east, Willamette Meridian. My will is, and I direct that my estate shall be divided into six shares of equal value to be disposed of in the following manner, viz.: First: Devises to his son, Fred. D. Love, one of said shares. Second: Devises to his son, Green C. Love, one of said shares. Third: Devises to his son, Lewis P. Love one of said shares. Fourth: Devises to his grandson, Wm. King, a son of my deceased daughter, Malinda J. Shepard, one third of one of said shares. Fifth: Devises to his granddaughter, Matilda Shepard, wife of James Shepard, and a daughter of his deceased daughter, Malinda J. Shepard, one third of one of said shares. Sixth: Devises to his great-granddaughter, Hazel King, who is a minor child and a daughter of Albion King, deceased, who was a son of my deceased daughter, Malinda J. Shepard, one-third part of one of said shares. Seventh: Devises to his daughter, Mary C. Stafford, one of said shares. Devises one of said shares to the children of his deceased son, Wm. Love, to be divided among them as follows: L. W. Love, $\frac{1}{5}$; Jno. A. Love, $\frac{1}{5}$; Ulysses G. Love, $\frac{1}{5}$; Chas. W. Love, $\frac{1}{5}$; Frank P. Love, $\frac{1}{5}$. It is my will and purpose that my estate shall be kept intact and not distributed to my devisees until January 1, 1907. I direct that my executors shall proceed to administer upon my estate at once after my demise, and having in due time closed up my estate as executors that then my estate shall pass to them as trustees to be held in trust for my said devisees till

January 1, 1907, and managed by them as such trustees till the time of final distribution. I direct that my trustees, T. T. Struble, Philo Hoolbrook and H. C. Breeden, from time to time as the receipts of my estate may exceed the expeditures, such portion thereof as in the judgment of my said trustees can safely be distributed, and paid to the devisees *pro rata*, not oftener than two times in each twelve months. I direct that my trustees make final distribution of my estate on January 1, 1907, or as soon thereafter as practicable and if my devisees can agree said distribution can be a division of the property by such agreement, but if they cannot so agree, then my trustees shall make a division of the property according to the shares and parts of shares in my estate and my devisees can cast lots for their several interests. Directs that in case any executor fails to serve, the remaining ones or one shall have full power."

The codicil is as follows:

"No. 1. I, Lewis Love, of Portland, Oregon, do make this codicil to my will. I hereby expressly confirm my last will, dated January 5, 1899, excepting in so far as the disposition of my property is changed by this codicil. First: I hereby will, decree, and declare that the devise or legacy to my daughter, Mary C. Stafford, in my said will, shall be for her sole and separate use, independent of her husband at all times, and that at her death the said devise or legacy to her shall go to her children, share and share alike. Second: I hereby will, decree, and declare that the said devise or legacy, in my said will, to my son, Fred D. Love, shall be for his sole and separate use, independent of his wife, at all times, and that at his death the said devise or legacy shall go to his children share and share alike. Third: I hereby will, decree, and declare that the devise or legacy, in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue, born alive, and living at the time of his death, then the said devise

or legacy to him, shall belong and go to the remaining devisees of my said will in proportion as they hold of the shares or parts of my said will. Lastly: I declare that this is a codicil to my will and that this is the only codicil I have made, and I hereby declare my said will of date January 5, 1899, to be my last will and testament, and also hereby reaffirm the same in every particular except as modified by this codicil, which codicil is to be attached to the said will."

The said trustees named in the will duly divided the property of Lewis Love among the various persons mentioned therein, in accordance with the provisions thereof; and the respective shares so allotted to the several parties were duly accepted by them as being a proper and lawful division of said estate in conformity with the provisions of the said will. Thereafter the said trustees commenced an action in the Circuit Court of the State of Oregon, for the county of Multnomah, for the purpose of having the division and allotment of said estate confirmed by the decree of said court. Upon the hearing the court set apart to plaintiff as his one-sixth interest a parcel of real property consisting of 126 acres, and held that the lots in controversy are included within the boundaries of said tract, and that the trustees under the will conveyed it to him in conformity with said decree. The complaint then shows: That Fred D. Love, a single man, Matilda Shepard and husband, William King and wife, Lewis P. Love and wife, Hazel King and husband, Mary C. Stafford, a widow, L. W. Love and wife, John A. Love and wife, Ulysses G. Love, a single man, Frank P. Love and wife, Charles W. Love and wife, and all the children of Mary C. Stafford, and of Fred D. Love, have conveyed their interest in said tract to plaintiff; that Mary C. Stafford is 74 years old, and will have

no more children; that Fred. A. Love is 68 years old; that plaintiff is 66 years old; that plaintiff has no children living, but has two grandchildren, both of age, who have conveyed their interests in said tract to plaintiff. There was a prayer that plaintiff be decreed to be the owner in fee of the property; that his title be adjudged to be marketable, and that defendant be required to specifically perform his contract of purchase. The defendant demurred to the complaint, his demurrer being as follows:

"The defendant demurs to the complaint herein for the reason and on the ground that said complaint does not state facts sufficient to constitute a cause of action. Defendant assigns as the reason why said complaint does not state a cause of action the fact that it shows upon its face that plaintiff's title is not a marketable title, for the reason that it appears that there are outstanding contingent interests in the said real estate in persons yet unborn, to wit, in the possible issue of the plaintiff and in the possible issue of Mary C. Stafford and Fred D. Love."

Said demurrer being overruled, defendant declined to further plead, and a decree was rendered against him as prayed for, from which decree he appeals.

AFFIRMED.

For appellant there was a brief submitted by *Mr. Edwin Lindstedt*.

For respondent there was a brief over the names of *Mr. Guy C. H. Corliss* and *Mr. Arthur Langguth*, with an oral argument by *Mr. Corliss*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1-4. One phase of this case was before the court in *Love v. Walker*, 59 Or. 95 (115 Pac. 296), and we there

held that the will and codicil gave plaintiff a life estate in the property with a remainder over to his issue. Frank Souers and Inita Souers, now Inita Souers Dixon, the grandchildren of plaintiff, were living at the time of the death of Lewis Love, and they therefore had a contingent remainder, because the fee in any event could only vest in such of them as survived plaintiff: 1 Tiffany, Real Property, § 120. The remainder over to the devisees is a contingent remainder, being conditional upon an event which may never occur, namely, the death of plaintiff without issue surviving him. Nevertheless, the devisees had a vested interest in the contingent remainder which they could convey: *Dunwoodie v. Reed*, 3 Serg. & R. (Pa.) 435; *Putnam v. Story*, 132 Mass. 205. The case first cited is conclusive as showing that where there are alternative remainders, and the vesting of the second depends upon the failure of the first, and the same contingency decides which one of the two alternative remainders shall take effect in possession, the rule that a remainder cannot be limited after a fee has no application. In the instant case the remainder over to the issue of plaintiff in case of his death, they surviving, and the further provision for a remainder over to the devisees of decedent in case no issue of plaintiff should be alive at his death, are alternative remainders conditioned upon the occurrence of one contingency, namely, the death of plaintiff; and, under the rule last stated, the bequest to the devisees of decedent constitutes a contingent remainder and not an executory devise: *Dunwoodie v. Reed*, *supra*. The courts will, if possible, construe a future estate to be a contingent remainder rather than an executory devise: 40 Cyc. 1645; *Burleigh v. Clough*, 52 N. H. 267 (13 Am. Rep. 23); *Waddell v. Rattew*, 5 Rawle (Pa.), 231; *Watson v. Smith*,

110 N. C. 6 (14 S. E. 640, 28 Am. St. Rep. 665). At common law all contingent estates could be released to the tenant for life: 1 Tiffany, Real Property, § 129(b). Under the more modern doctrine all estates in land, whether in fee or remainder, may be conveyed by deed. Some of the authorities hold that such deeds operate only equitably by way of estoppel, and others, that the contingent interest passes directly. The latter we think the better rule in this state as being more in conformity with the spirit of our Code: Section 7100, L. O. L.; 1 Tiffany, Real Property, pp. 306, 307. The interest of possible unborn children of plaintiff is a contingent remainder, as is also the interest of possible unborn children of Fred D. Love, and, with the exception of such unborn children, the interest given to the other devisees in the will, while contingent as to the event which will cause it to devolve, is a vested interest so far as the persons who are to enjoy it are concerned.

5. This brings us to a consideration of the effect of the conveyances of the grandchildren of plaintiff and of those of the devisees upon the contingent remainder of the possible unborn children of plaintiff and Fred D. Love; there being no such possibility in the case of Mrs. Stafford, who is 74 years old. If plaintiff should die leaving only these two grandchildren, or one of them, surviving him, there is no question but that by their conveyance the title in fee would be in his estate; and the remainder over to the devisees would fail. Remote contingent remainders not being favored in law, it has always been in the power of the tenant for life to extinguish his life tenancy and convert it into a fee simple by merging it with the ultimate estate; and this is what has happened here. The plaintiff has a conveyance from every living being upon which the

estate could devolve upon termination of his life estate. These interests, contingent as to their occurrence, but vested as to the persons who should enjoy them, have become merged with the life estate, and thereby remainders remotely possible are destroyed. The reason for this is that the conveyance of the ultimate estate destroys the life estate, and, as the contingent remainders are predicated upon the life estate, they fall with the foundation upon which they are built. "Contingent remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. Therefore, when there is a tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender or other methods, destroy and determine his own life estate before any of those remainders vest; the consequence of which is that he utterly defeats them all": 2 Blackstone, p. 172. For this reason Blackstone relates that a device was invented of interposing trustees having a legal estate upon which the contingent remainders might rest to preserve them from annihilation by a merger of the life estate. The rule is thus stated in 4 Kent, Com. (10 ed.), page 284:

"If the particular estate determine, or be destroyed before the contingency happens on which the expectant estate depended, and leave no right of entry, the remainder is annihilated. * * The particular estate in the tenant in tail, or for life, may be destroyed by feoffment or fine; for these conveyances gain a fee by disseisin, and leave no particular estate in esse, or in right, to support the contingent remainder. (d) So, if the tenant for life disclaimed on record, as by a fine, a forfeiture was incurred upon feudal principles; and if the owner of the next vested estate of freehold entered for the forfeiture, the contingent remainder was

destroyed. (a) A merger, by the act of the parties, of the particular estate, is also equally effectual as a fine to destroy a contingent remainder. (b) But with respect to this doctrine of merger, there are some nice distinctions arising out of the case of the inheritance becoming united to the general estate for life by descent; for, as a general rule, the contingent remainder is destroyed by the descent of the inheritance on the particular tenant for life. Out of indulgence, however, to last wills, the law makes this exception: That if the descent from the testator or the particular tenant be immediate, there is no merger; as if A devises to B for life, remainder to his first son unborn, and dies, and the land descends on B as heir at law. Here the descent is immediate. But if the fee, on the death of A had descended on C, and at his death on B, here the descent from A would be only mediate, and the contingent remainder to the unborn son of B would be destroyed by merger of the particular estate on the accession of the inheritance. Mr. Fearne (c) vindicates this distinction, and reconciles the jarring cases by it; and it has been since judicially established, in *Crump v. Norwood* [7 Taunt. 362] (d)."

To like effect, see *Bennett v. Morris*, 5 Rawle (Pa.), 9; *Dunwoodie v. Reed*, *supra*; *Archer v. Jacobs*, 125 Iowa, 467 (101 N. W. 195).

Upon the whole case we are satisfied that by the conveyances before mentioned the contingent remainders of possible unborn children of plaintiff and Fred D. Love have been annihilated, that plaintiff is the owner in fee simple of the property in controversy, and that his title thereto is marketable. The decree of the Circuit Court is therefore affirmed. AFFIRMED.

MR. JUSTICE BEAN took no part in the consideration of this case.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

MR. JUSTICE BURNETT concurs in the result.

Argued April 15, affirmed April 20, 1915.

SMITH v. WALTERS.

(147 Pac. 925.)

Appeal and Error—Questions Reviewable—Bill of Exceptions.

1. Section 171, L. O. L., as amended in 1913 (Laws 1913, p. 651), providing for the certification of the entire testimony as a bill of exceptions, applies only to cases involving consideration of motions for nonsuit or directed verdict, and any other question of fact in an action at law will not be considered without a bill of exceptions.

From Marion: **PERCY R. KELLY**, Judge.

This is an action by F. P. Smith against Van Walters and Anna Walters and W. S. Mott. From a judgment in favor of plaintiff, defendant Mott appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Carey F. Martin* and *Mr. Ivan G. Martin*, with an oral argument by *Mr. Carey F. Martin*.

For respondent there was a brief and an oral argument by *Mr. Walter C. Winslow*.

Department 1. **MR. JUSTICE BENSON** delivered the opinion of the court.

The question sought to be presented here is the action of the trial court in admitting certain documentary evidence over the objection of defendant.

There is no bill of exceptions, and we must look to the transcript of the testimony to find what evidence is necessary to disclose the admissibility of the paper referred to. This court has repeatedly held that no question of fact will or can be investigated in this court, in an action at law, without a bill of exceptions. It is true that Section 171, L. O. L., as amended in 1913

(Laws 1913, p. 651), provides for the certification of the entire testimony as a bill of exceptions, but that provision has been held to apply only to such cases as involve consideration of motions for nonsuit or directed verdict: *West v. McDonald*, 67 Or. 553 (136 Pac. 650); *Abercrombie v. Heckard*, 68 Or. 104 (136 Pac. 875).

While a consideration of the case upon the merits would have brought us to the same final result, the judgment of the trial court must be affirmed for want of a bill of exceptions.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Argued March 5, affirmed March 30, rehearing denied April 20, 1915.

TAYLOR v. PETERSON.*

(147 Pac. 520.)

Brokers—Compensation—Necessity of Written Contract.

1. To recover for work and labor performed at the oral request of the defendant in selling land for him, it must be shown, not only that the defendant requested the performance of the service before Section 808, L. O. L., was amended by Act of 1909, page 69, so as to require an agreement, thereafter made, to sell real estate on commission to be in writing, and forbidding the introduction of any evidence thereof except the writing, but also that the plaintiff performed the services prior to that time, since there was no obligation to pay for them until they were performed.

[As to validity of statute requiring contract providing for commission for sale of realty to be in writing, see note in Ann. Cas. 1913C, 727. As to right of real estate broker to commissions under oral contract of employment where statute requires written contract, see note in Ann. Cas. 1915A, 1133. As to acts which may constitute part performance, see note in 53 Am. Dec. 539. As to enforcement of contracts because of part performance, see note in 32 Am. Dec. 129.]

*As to the necessity that agent's authority to purchase or sell real property be in writing, to enable him to recover compensation for his services, see notes in 44 L. E. A. 601 and 9 L. E. A. (N. S.) 933.

Brokers—Compensation—Necessity of Written Contract—Full Performance.

2. The full performance by a broker of an oral contract to sell land for another on commission does not take the contract out of the statute of frauds, Section 808, L. O. L.

Brokers—Commissions—Action—Proof.

3. In an action for broker's commission, proof that the broker, who admittedly had no exclusive agency, offered the property to the city, and that the city thereafter purchased it, is not sufficient to entitle him to a commission, since it fails to show either that he secured the execution of a binding contract for the sale, or that he and not another was the means of bringing the parties together.

[As to when broker becomes entitled to commissions, see notes in 28 Am. St. Rep. 546; 39 Am. St. Rep. 225.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by James A. Taylor against John H. Peterson.

The most essential allegation of the complaint is the following:

"That commencing on or about January 1, 1909, and ending on or about February 1, 1912, the plaintiff, at the special instance and request of said defendant, performed work, labor, and services for said defendant in negotiating for the sale of the above-described property and as a direct result of said negotiations, work, labor and services, and through the efforts of said plaintiff, said property above described was sold for said defendant for the sum of \$35,000."

Asserting that the reasonable value of plaintiff's services mentioned is \$5,000, and that the defendant repeatedly agreed that said sum should be considered between them as such reasonable value, the plaintiff demands judgment for that amount. The answer traverses all the allegations of the complaint, and alleges:

"The contract set forth in the complaint is oral and not in writing and is void by virtue of Section 808 of Lord's Oregon Laws."

The reply does not deny that the contract was oral, but does traverse the conclusion of law, to the effect that the agreement is void under the statute of frauds of this state. At the close of plaintiff's case in a trial by jury the Circuit Court granted a judgment of nonsuit on motion of the defendant, and the plaintiff appeals. **AFFIRMED. REHEARING DENIED.**

For appellant there was a brief and an oral argument by *Mr. Frank F. Freeman*.

For respondent there was a brief over the names of *Mr. M. M. Matthiessen* and *Messrs. Wood, Montague & Hunt*, with an oral argument by *Mr. Matthiessen*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The statute in question, so far as applicable to this case, reads thus:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: * * 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission": Section 808, L. O. L.

The last clause, No. 8, was embodied in an amendment to this section by the act of February 9, 1909 (Laws 1909, p. 69), which took effect on May 21st of that year.

In support of his contention the plaintiff testified as follows:

"In January, 1909, Mr. Peterson suggested my making an effort to dispose of his property to the city. The matter was talked over. I was prepared to put the tender in at that time, and Mr. Peterson finally suggested there might be a change of administration, there might be an election in a few months, and it might be well to wait, thinking probably that the term of the administration was nearly expired, and they might not care to take it up until after election and let it lay over until the new officers were installed, which I did. He confirmed the matter, I remember, almost immediately. I think early in July, 1909, my first tender, my original tender, was a proposition to sell for a certain figure, or to trade for a 30-year lease of a waterfront at the foot of Stark Street, which the city owned. Mr. Peterson proposed to trade even for the lease; he was to erect a concrete dock there."

By timely objection the defendant opposed the consideration of such testimony on the ground that the evidence to support the contract described in the complaint must be in writing. The plaintiff as a witness also related a number of oral declarations of the defendant made in 1911, to the effect that he would pay plaintiff just the same. He also introduced in evidence the following documents: (1) The tender he made to the City of Portland under date of August 4, 1911, offering the property for sale at \$35,000; (2) an offer of J. W. Travers proposing to sell the same property to the city for the same price; (3) the report of the committee on ways and means of the council of the City of Portland, recommending that among others the tenders of J. A. Taylor and J. W. Travers be placed on file, and submitting an ordinance authorizing the mayor to offer to the owner of the property in question the sum of \$35,000 in jail bonds at par; and (4) a transcript of the record of a conveyance from the defendant and his wife to the City of Portland for

the realty named, in which the consideration of \$35,000 was expressed. The declarations of several witnesses as to the reasonable value of the services of a real estate broker who effected the sale also appear in the record. The plaintiff testified to the effect that he interviewed various members of the city council and endeavored to create public sentiment in favor of the purchase of the tract whereon to build a city jail, and introduced an article, signed by the defendant and published in a newspaper in the city, treating of the desirability of the premises in which he said, under date of July 31, 1909: "Several weeks ago I made a tender to the authorities through my agent, J. A. Taylor, of my property," referring to that already mentioned.

1. The foregoing is a fair *résumé* of all the testimony introduced on behalf of the plaintiff. The only writing said to be subscribed by the defendant imputing agency to the plaintiff is the newspaper article. That, however, does not purport to be a contract, and does not express any consideration. The principal question to be decided is the one ruled upon by the trial court, viz., whether the plaintiff proved a case sufficient to be submitted to the jury. The utmost that can be claimed by the plaintiff, in view of his testimony, is that in January, 1909, before the enactment of the statute mentioned, the defendant requested him to induce the city to purchase the property. There is no testimony whatever tending to show that the plaintiff did anything in response to this request until July of that year. One party may request another to perform for him certain services, but no obligation or contract to pay for such services arises until they are performed. We must remember that the complaint is

laid on the allegation that the plaintiff, at the special instance of the defendant, performed work, labor and services for the defendant. This averment being traversed, it was incumbent upon the defendant to prove it by competent evidence. Under the statement of his complaint and his own testimony no engagement to pay for his labors came into existence until at least in July, 1909; for he himself says he did nothing until that time, and that was after the new law went into effect. To prove a contract for services of the kind declared upon and arising after the amendment was in force, the statute expressly says that:

“Evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents in the cases prescribed by law.”

In this respect our Code is more stringent than any other to which our attention has been directed. In mandatory language it forbids proof of any kind other than the writing, yet here the plaintiff would rely upon the oral testimony entirely unless we may except the newspaper article to which reference has been made. As already pointed out, that does not satisfy the statute because, for one thing, it does not express the consideration.

2. The plaintiff claims that he fully performed everything to be accomplished by him, and that this obviates the objection urged by the defendant under the statute. There is apparent contrariety of opinion among the precedents upon this question, but the rule is thus laid down by this court in *Sorenson v. Smith*, 65 Or. 78 (129 Pac. 757, 131 Pac. 1022, Ann. Cas. 1915A, 1127, 51 L. R. A. (N. S.) 612):

“When an enactment expressly declares that an agreement for the payment of a commission for secur-

ing a purchaser of land is void, unless it is in writing and signed by the owner of the real property, the rule is well established that, in the absence of a written contract, a full performance of the services by the broker does not take the case out of the statute of frauds"—citing *Myres v. Surryhne*, 67 Cal. 657 (8 Pac. 523); *Shanklin v. Hall*, 100 Cal. 26 (34 Pac. 636); *McGeary v. Satchwell*, 129 Cal. 389 (62 Pac. 58); *Dolan v. O'Toole*, 129 Cal. 488 (62 Pac. 92); *Beahler v. Clark*, 32 Ind. App. 222 (68 N. E. 613); *Price v. Walker*, 43 Ind. App. 519 (88 N. E. 78); *King v. Benson*, 22 Mont. 256 (56 Pac. 280); *Marshall v. Trerise*, 33 Mont. 28 (81 Pac. 400); *Blair v. Austin*, 71 Neb. 401 (98 N. W. 1040); *Rodenbrock v. Gress*, 74 Neb. 409 (104 N. W. 758); *Barney v. Lasbury*, 76 Neb. 701 (107 N. W. 989); *Gerard-Fillio Co. v. McNair*, 68 Wash. 321 (123 Pac. 462).

The same precept was reiterated in *Slotboom v. Simpson Lbr. Co.*, 67 Or. 516 (135 Pac. 889, 136 Pac. 641, Ann. Cas. 1915C, 339).

3. Again, it is taught in *York v. Nash*, 42 Or. 321 (71 Pac. 59), *Hardy v. Sheedy*, 58 Or. 195 (113 Pac. 1133), *Henry v. Harker*, 61 Or. 276 (118 Pac. 205, 122 Pac. 298), and in *Grindstaff v. Merchants' Investment & Trust Co.*, 61 Or. 310 (122 Pac. 46), that in the performance of a contract like the one upon which the plaintiff relies the broker must do one of two things before he can recover his commission from his employer; he must furnish his principal a binding contract executed by an intending purchaser who is able to buy and upon whom, if he fails to buy, the principal may have recourse, or the broker must, by some means, bring the buyer and seller together or into communication with each other so they may themselves make the contract and conclude the sale. If he falls short of this he fails in the performance of his contracts. His efforts are in vain. Conceding to the testimony of the

plaintiff its full value on this point, it shows nothing more than that he endeavored to induce the municipal authorities to take measures for the purchase of the property by the city; but whether it was his argument which brought about the final result, or that of Travers, or of the defendant himself, the record is silent. Upon that feature we are left to mere conjecture, for the plaintiff does not pretend that he had the exclusive right to negotiate a sale of the property. The essential element without which recovery cannot be had upon the *quantum meruit* is that the services counted upon were of some value to the principal for whom they were rendered: *West v. McDonald*, 64 Or. 203 (127 Pac. 784, 128 Pac. 818). Independent of the statute of frauds, therefore, if we could consider this under the head of reasonable worth, the testimony of the plaintiff falls short of showing that the defendant reaped any benefit from the services mentioned in the complaint. In default of his having exclusive authority to effect a sale, the mere transfer of the title does not prove that he accomplished that result. From every point of view the judgment of the court in granting a nonsuit was correct, and it is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Argued November 30, affirmed December 22, 1914, sustained on rehearing April 20, 1915.

STATE ON INF. LILJEQVIST v. JOHNSON.

(144 Pac. 1148; 147 Pac. 926.)

Municipal Corporations—Notices—Posting.

1. Where notices of election to create a corporation came from the proper source and were displayed in public places for the designated time, it was immaterial who posted them.

Municipal Corporations—Creation—Elections—Posting of Notices—Place of Posting.

2. The posting of a notice of election to create a corporation outside of the proposed municipality, but within the precinct, is sufficient.

Municipal Corporations—Creation—Elections—Hours of Election—Notice.

3. Failure of a notice of election to create a corporation, to specify that the polls would be open until 8 o'clock, as required by law, did not affect the validity of the election, in the absence of any crowding at the polls or any proof that anyone came too late to vote.

Municipal Corporations—Organization—Conflict With Existing Corporations.

4. The existence of the Port of Coquille River with control of the river and bay and harbors between its boundaries and the sea, but excluding from its territory about 25 miles of the river and bay, does not prevent the creation of a port to include all the territory along the river below the Port of Coquille River, for a conflict between the two is not probable or possible.

Appeal and Error—Finding—Conclusiveness.

5. A finding sustained by evidence is controlling on appeal.

Municipal Corporations—Organization—Elections—Time of Election.

6. The statute providing that the County Court shall call a special election to be held not less than 40 days, nor more than 60 days, on the question of the creation of a municipal corporation, refers to the length of time a call must be made preceding the day fixed for the election.

Municipal Corporations—Creation.

7. The improper inclusion of land within a proposed port will not invalidate the proceedings for incorporation, where the quantity is so negligible that its inclusion could have had no appreciable effect on the election, and it does not infringe on the taxable property in any other port.

Municipal Corporations—Creation.

8. The existence of a port, created to prevent improvements on the river below the corporate limits, does not prevent the organization of a port to include lands excluded from such limits.

From Coos: JOHN S. COKE, Judge.

This is a *quo warranto* proceeding by the State of Oregon, upon the information of L. A. Liljeqvist, district attorney for Coos County, Oregon, against E. E. Johnson, J. E. Norton, T. P. Hanly, R. H. Rosa, R. E. L. Bedillion and the Port of Bandon, a pretended municipal corporation. From a judgment for defendants, the informant appeals.

AFFIRMED. SUSTAINED ON REHEARING.

For appellant there was a brief and oral argument by *Mr. Lawrence A. Liljeqvist*.

For respondents there was a brief over the names of *Mr. G. T. Treadgold, Mr. Abner H. Jones, Mr. George P. Topping, Mr. F. J. Feeney, Mr. T. F. Haggarty* and *Mr. William C. Chase*, with an oral argument by *Mr. Treadgold*.

Department 2. MR JUSTICE EAKIN delivered the opinion of the court.

This is an action in *quo warranto* brought by the district attorney of Coos County to test the validity of the election creating the corporation of the Port of Bandon. There are many assignments of error going to the regularity of the election held for its incorporation. Plaintiff contends that the territory sought to be included in the Port of Bandon includes parts, but less than all, of several precincts, and questions the sufficiency of the posting of notices of election, they being posted by private parties; that many of the judges

and clerks of election had removed from the precinct or were otherwise disqualified to serve. There is no provision of law for the election of the successor of such judge or clerk until election day, and the notices of election sent by the county clerk to him could not be posted as directed unless it be done by a volunteer, which in this case for the purpose of posting them a committee of the promoters of the Port of Bandon was appointed to post them in all places where otherwise there would have been none posted; and this is complained of as being illegal and rendering the election void.

1. If the notices emanated from the proper source and have been displayed in public places for the designated time, which seems to have been done in this case, it would appear to be immaterial who posted them. It is so held by Mr. JUSTICE MOORE in *State v. Sengstacken*, 61 Or. 455 (122 Pac. 292, Ann. Cas. 1914B, 230).

2. It is also assigned as error that the notices were posted in the precinct, but outside the boundaries of the proposed port, and in some cases the polling place was also outside the port; but the only provision of law for the posting of notices in the precinct considers each precinct the unit and regards it as an integral part of the whole county, and such posting is designed and presumed to inform all the voters of such precinct, even when posted outside the district sought to be incorporated: *Roesch v. Henry*, 54 Or. 230 (103 Pac. 439). In case of a general election it is presumed to give notice to every voter, and, until some more direct and definite mode is prescribed for giving it, such notice is the only one that can be given, and was in fact notice to the voters.

3. Also, it is objected that the polls were not kept open from 8 A. M. until 8 P. M. on election day; but for

such neglect, to render the election void, it should appear that voters were by reason thereof deprived of their right to vote. The failure of the notice to specify that the polls would be open until 8 P. M. could mislead no one. The notice specified that it would be open until 7 P. M., and as there seems to have been no crowding at the polls, or proof that anyone was too late to cast a vote, the objection has no merit.

4. The important question raised in this controversy is that the Port of Coquille River heretofore organized, although not containing within its boundaries the whole territory of the Coquille River basin, there being about 25 miles of the river and bay not included in its boundaries, was given control of the river and bay and harbors between the boundaries of the port and the sea, and that such control is exclusive of any other port by virtue of the terms of Section 6121, L. O. L. The Port of Bandon includes all that territory along the Coquille River below the Port of Coquille River; but the control of the river beyond the limits of the port to the sea is principally for the purpose of improving it, and there can be but little conflict in that regard if both proceed to make improvements as each can spend only its own money. The Port of Coquille River includes territory on or adjacent to the river above the center of sections 28, 29 and 30, township 28 south, range 12 west, and the center of sections 25 and 26, township 28 south, range 13 west, between which and the sea there is about 25 miles of the river. The question of the good faith of the promoters of the Port of Coquille River in incorporating only the upper part of the river and leaving out much of the taxable territory, as well as part of the river where improvements might be beneficial, evinces that there must have been some sinister pur-

pose in doing so; and there is testimony tending to show that the purpose was to improve principally, if not only, the upper part of the river and maintain the control of such improvement. Thus the Port of Coquille River should have no objections to another port taking charge of the improvement of the remaining portion of the river and bay. Neither do we think such conflict probable or even possible. That situation exists on the Columbia River where the Port of Portland includes only part of Multnomah County, and in its charter it is given full control of the river between the city and the sea. The Port of Columbia includes Columbia, Clatsop and Multnomah Counties, which give it control also of the Columbia below the Port of Portland. It was first given a charter by the legislature, but that was held unconstitutional as in violation of Section 2 of Article XI of the Constitution, as amended in 1906, forbidding the legislature by special enactment to create a municipality. The court says: "But for this constitutional amendment the enactment could possibly be sustained": *Farrell v. Port of Columbia*, 50 Or. 169 (91 Pac. 546, 93 Pac. 254). And it has been since incorporated by an initiative act, and there seems to be no conflict nor any question raised as to the legality of either.

5. As to the assignments of error 30, 31 and 32, involving the question of the Port of Bandon including territory draining into some other basin, the evidence tends strongly to establish that the Port of Bandon does not include any territory that drains into the Port of Coos Bay or the Port of Coquille River; and in any event the trial court found in favor of defendant upon that question, and that is controlling here.

6. We give but little weight to the contention that the statute provides the County Court shall call a

special election to be held not less than 40 days nor more than 60 days. These words, "not less than 40 days nor more than 60 days," should have preceded the clause "shall call a special election," and all difficulty would have been avoided. One cannot read the statute and not understand that it refers to the length of time a call must be made preceeding the day fixed for the election.

We find no error in the proceedings of the Circuit Court, and the judgment is affirmed. **AFFIRMED.**

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

MR. JUSTICE McNABY taking no part in the consideration of this case.

Former opinion sustained April 20, 1915.

ON PETITION FOR REHEARING.

(147 Pac. 926.)

In Banc. **MR. JUSTICE McBRIDE** delivered the opinion of the court.

7. Upon rehearing it is insisted that a large scope of territory not forming a part of the watershed of the Port of Bandon is included within its boundaries, and that its northern boundary includes lands forming part of the watershed of Coos Bay. The maps presented are confessedly inaccurate, and it appears probable that a small portion of land upon the north is so included; but the quantity is so negligible compared with the whole area of the proposed port that its inclusion could have had no appreciable effect on the

election, and does not infringe upon the taxable property in any other port. It may well be that if the owners of property so included should refuse to pay taxes to the Port of Bandon, or themselves raise the question as to their improper inclusion within the port, the courts would afford them relief, not by declaring the whole proceedings void, but by declaring such property to be outside the limits beyond which the port could be legitimately extended.

8. A larger area of land whose streams flow into the Coquille River above the Port of Bandon, and empty into that stream within the territorial limits of the Port of Coquille, is also included. The situation here is peculiar. Both ports are situated upon the same river, and the watershed of one is in a sense the watershed of the other; that is, the streams flowing through the Port of Coquille empty into the Coquille River, upon the lower waters of which is situated the Port of Bandon. The Port of Coquille, which seems to have had for one of its purposes rather the prevention of improvements upon the lower river than in good faith improving it, did not include, as it might have done, these lands now included in the Port of Bandon; and as they form part of the watershed of both ports they were properly included in the latter port. We do not believe that it was ever the intention of the legislature to permit the settlers upon an insignificant portion of a tidal stream to put a belt across it at its headwaters, do little or nothing themselves, and prevent other communities lower down from making extensive and *bona fide* improvements. If the law should be so interpreted, a dozen men owning a section of land upon a navigable stream could organize a "port" and prevent legitimate improvement of the stream by large communities above or below.

The evidence in this case tends to show that the organizers of the Port of Coquille never intended, and do not now intend, to make substantial improvements on the river below the boundaries of the port; that they object to having the large communities below annexed to them; and we are satisfied they are seeking to use the power of the state to prevent the improvement of the lower river. Since the communities below the Port of Coquille cannot be annexed to that port without its consent, and it is plain that such consent will never be given, their only remedy was to form a port of their own, and this, for the reasons given in our former opinion, we think they had a right to do, and that the Port of Bandon is a legally organized port.

AFFIRMED.

FORMER OPINION SUSTAINED ON REHEARING.

Argued February 24, affirmed March 16, modified on rehearing April 27, 1915.

WILEY v. WHITNEY.

(146 Pac. 1093; 147 Pac. 938.)

Appeal and Error—Grounds of Review—Presentation in Lower Court.

1. In an equity suit, where defendants made no showing that they were misled by the statement of facts in the reply, the fact that the reply was a departure from the complaint is no ground for reversal.

Dower—Mortgage as Bar.

2. A husband and wife acquired a donation land claim. The wife died, and the husband married plaintiff. Thereafter the husband, plaintiff joining, mortgaged his undivided half of the claim. *Held*, that, a patent having been issued to the husband for the south half of the claim, the mortgage lien attached only to the undivided half of the south half of the claim, and, notwithstanding foreclosure, plaintiff was, upon the husband's death, vested with a dower estate in an undivided half of the south half of the claim.

Deeds—Execution—Requisites.

3. A written instrument, not sealed, witnessed, or acknowledged, is insufficient to convey title.

Mortgages—Foreclosure—Strict Foreclosure.

4. Where an attorney agreed to advance money to buy in the state's claim against plaintiff's land, and plaintiff agreed that, if she did not reimburse him within a stipulated time, he should become entitled to that portion of the land, there was a confidential relation between the parties, and plaintiff's rights to the land could be barred only by a strict foreclosure.

FROM LINN: WILLIAM GALLOWAY, Judge.

Department 2. Statement PER CURIAM.

This is a suit by Elizabeth Wiley against J. J. Whitney, Lizzie Whitney, Arthur Stitts, Fred Wadtli and Will Putnam.

The substance of the complaint is that the plaintiff, Elizabeth Wiley, is and at all the times stated has been the owner in fee of the donation land claim of Andrew and Lucy Wiley, in Linn County, Oregon, containing 321.75 acres, and that she is in the sole possession thereof; that without her consent the defendants, about December 10, 1911, forcibly entered upon the land and unlawfully cut and removed therefrom 150 trees; that they threaten to continue such trespass, and unless restrained they will commit further waste upon the premises; that they unlawfully claim an interest in the real property, which claim is without right; and that the plaintiff has no plain, speedy or adequate remedy at law. The prayer is that the defendants be required to set forth the nature of their claim; that it may be decreed to be invalid, and that the plaintiff is the owner in fee of the land; that she recover \$3,000 as treble damages for the trespass; and for such other and further relief as may be equitable.

The effect of the answer, after denying the material averments of the complaint, is that Andrew Wiley and Lucy Wiley, his then wife, settled upon the real property described in the complaint as their donation land claim; that Lucy died, and Andrew remarried Eliza-

beth, the plaintiff; that he and his second wife, on February 22, 1870, executed to the board of school land commissioners a mortgage of the undivided half of the claim, to secure the payment of \$1,000; that it was the intention of the mortgagors, when the lien was created, that it should be an encumbrance upon the husband's half of the donation land claim when his separate estate in the premises was legally set off to him; that on March 23, 1874, by consideration of the Circuit Court of the State of Oregon for Linn County, the lien of the mortgage was duly foreclosed, and the real property decreed to be sold to satisfy the sum of \$1,122.21, with interest from that time at the rate of 10 per cent per annum; that on March 18, 1881, the United States granted to Andrew Wiley the south half of the donation land claim and to the heirs of Lucy Wiley the north half; that, no enforced sale of the land having been made, the board of school land commissioners on March 13, 1882, upon due service of process, obtained a supplemental decree authorizing the issuance of an order of sale of the premises to satisfy the sum of \$2,019.60 then due, and the further sum of \$69.97 as costs and disbursements; that a writ was issued to the sheriff of that county, who on May 26, 1882, duly sold to the board of school land commissioners the undivided half of the donation land claim for the sum of \$1,600; that the sale was duly confirmed, and, no redemption having been made, the sheriff on August 31, 1893, executed to the purchaser a deed of the mortgaged premises; that on September 16, 1907, and for more than 10 years prior thereto, the State of Oregon claimed to be and was the owner in fee and in the possession of the south half of the donation land claim of Andrew Wiley and wife; that at the time last mentioned the plaintiff requested the defendant J. J. Whit-

ney to purchase that land from the state, to take the title in his own name, and pay for the premises his own money, which necessary sum she agreed to repay on or before January 1, 1908, with interest and expenses, and then subscribed her name to a writing to that effect, in which it was stipulated, "And in the event I fail to pay the said J. J. Whitney as above stated, then in that event I do hereby promise and agree to surrender all right or rights I have to the aforesaid land and premises to the said J. J. Whitney"; that thereupon he purchased the land from the state, paying therefor, of his own money, \$1,000, which sum was then the reasonable value of the premises, and the deed was executed to him; that he immediately notified the plaintiff of what he had thus done, and if she had repaid him the money, interest and expenses within the time specified he would have executed to her a good and sufficient deed to the land; that she failed and refused to pay any part of such sum at any time; that by the terms of the writing last mentioned time was made of the essence of the agreement, and by reason of the plaintiff's failure and refusal to make the payments agreed upon she surrendered all her right to or interest in the land, and in consequence thereof the defendant J. J. Whitney, since his purchase from the state, has been the owner of the real property, and in the open, notorious and exclusive possession thereof under a claim of title thereto in fee; and that the only trees cut by either of the defendants have been severed from the south half of the donation land claim.

For a second defense it is averred, in substance, that the defendant J. J. Whitney and his grantors have been in the exclusive, uninterrupted, adverse possession of the south half of the donation land claim since August 31, 1893, when the sheriff's deed was executed

to the State of Oregon, and that whatever trees have been felled by either of the defendants have been cut from that part of the claim. The prayer of the answer is that J. J. Whitney be decreed to be the owner in fee of the south half of the claim, that the plaintiff be enjoined from interfering therewith or asserting any claim thereto, adverse to his title, and for such further relief as may seem proper.

The reply contradicted some of the statements of new matter in the answer, and further averred substantially that for more than 25 years the plaintiff had been in the open, notorious and adverse possession of the entire donation land claim. A further reply states in effect that for more than 15 years prior to January 1, 1908, and ever since that time, the plaintiff has been the owner in fee of the entire donation land claim; that she is quite aged, and has no knowledge of legal matter, while the defendant J. J. Whitney has practiced law in Oregon many years, and is thoroughly conversant with business transactions; that for a long time prior to January 1, 1908, he acted as counsel and attorney for her in legal and business matters, and she implicitly relied upon him; that during the year 1907 he was acting in that capacity for her and advised her as to the condition of her title to the land, saying he would investigate the claim of the state thereto and ascertain what sum would be required to secure a relinquishment of its rights to the premises and thereby remove a cloud from her title; that on September 16, 1907, and while he was acting as attorney and counselor for her, she engaged him to secure from the board of school land commissioners an acquittance of the interest of the State of Oregon in the premises upon the best possible terms, and agreed to repay him the sum of money necessarily laid out for that purpose,

together with such other sums as might necessarily be incurred by him; that acting as her agent and attorney, and not otherwise, he paid \$1,000 to the State of Oregon for its relinquishment of all claims to her land; that he falsely and fraudulently represented to her that in order to remove the cloud from the title the application to the board of school land commissioners "has to go through a kind of process of law," and relying upon that statement she was induced to allow him to take the relinquishment in his own name, and he now holds the title as trustee for her and not otherwise; that as soon as she learned he had secured the title, she offered to pay him \$1,000 and all other expenses that he had necessarily incurred, but he then and ever since refused to accept the money, or to execute to her a deed of the land; that at all times since hearing of the execution of the relinquishment she had been ready, able and willing to repay the sum of \$1,000 and all other expenses he had incurred; that he has no title to the premises in his own right, and the interest which he has therein is held in trust for her; and that when the title was thus obtained by him the value of the south half of the donation land claim then was and now is many times the sum which he paid out. The prayer of the reply is for a decree as set forth in the complaint.

A motion to strike out the second further and separate reply, because the averments so objected to constituted a departure from the allegations of the complaint, was denied. Thereupon a demurrer, interposed to that part of the final pleading and based on the same ground, was overruled. The cause was tried, and from the evidence given the court made findings of fact and of law, and thereupon decreed that the plaintiff was

the owner in fee of the entire donation land claim; that neither of the defendants had any estate or interest in the premises, except the lien of the defendant J. J. Whitney; that the plaintiff had sustained damages in the sum of \$150 by the cutting and removal of trees from her land; that the defendant J. J. Whitney had a lien on the south half of the claim to secure the sum of \$1,000, with interest from October 22, 1907, and \$150 as attorneys' fees, amounting to \$1,369.33, which sum was to draw interest from April 20, 1914, the date of the decree, until paid; that upon the plaintiff's payment of that amount to the clerk of the trial court within 60 days J. J. Whitney should execute to her a deed of the premises, and upon his failure so to do the decree should stand in lieu thereof. From this decree the defendants appeal.

AFFIRMED. MODIFIED ON REHEARING.

For appellants there was a brief over the names of *Mr. William R. Bilyeu*, *Mr. William S. Risley* and *Mr. John J. Whitney*, with oral arguments by *Mr. Bilyeu* and *Mr. Risley*.

For respondent there was a brief with oral arguments by *Mr. W. S. McFadden* and *Mr. Arthur Clarke*.

Opinion PER CURIAM.

1. Whether the allegations of the complaint and the reply are so inconsistent as to amount to a variance is unimportant. A statement of matter in a reply, set forth as a cause of suit, which averments do not amplify, support or fortify the allegations of the complaint, cannot be so prejudicial in a suit in equity, where the issues are tried by the court, as in an action at law, where the disputed questions to which the par-

ties have narrowed their several averments are to be tried by a jury: *Brown v. Baker*, 39 Or. 66 (65 Pac. 799, 66 Pac. 193). No showing was made at the trial that the defendants were misled by the statement of facts in the reply that were not set out in the complaint. The action of the court in denying the motion to strike out parts of the reply, and in overruling the demurrer to a portion of that pleading, will not be reviewed.

2-4. Although the reply seems to recognize the defendant J. J. Whitney as holding the legal title to the south half of the donation land claim in trust for the plaintiff, she undoubtedly had such an estate in the premises, as will be hereinafter stated, as to enable her to enjoin a trespass upon the land and to have an alleged adverse claim of title determined. A careful examination of the evidence shows that the defendant J. J. Whitney as the plaintiff's attorney advised her as to what she should do in order to protect her adverse possession of the land against the claims of the state. Thus in a letter which he wrote her April 14, 1903, he says:

"Your favor of the 13th inst. at hand and contents noted. There is nothing we can do, except you want to hold possession and see that whoever purchases said premises are kept out of possession, which will force them to bring suit of ejectment against you."

In a letter written to the plaintiff February 10, 1904, he stated:

"You are relying on holding under the statute of limitations, and all you have to do is to watch yourself and the land and be sure and keep possession, and if you do as I have directed you there will be no trouble about your retaining possession. If I find out at any time that there is a move on foot to your disadvantage, I will notify you."

January 9, 1907, he wrote her as follows:

"I was in Salem yesterday, and whilst there I had a talk with Crawford, the Attorney General, also with Mr. West, the clerk of the state land board, with regard to the land that is in dispute between you and the school fund. Crawford had before him a partial abstract furnished to him by Weatherford & Wyatt, under which they claim title to the land under a sheriff's deed made by C. C. Jackson to the school board. I have thought the matter over as close as I could, and I have come to this conclusion that the best way for us to proceed is for you to make me a quitclaim deed for the land sold by Sheriff Jackson to the school board. I am of the opinion that, if I have such a deed from you, I can take the deed, and go before the land board, and make a deal with them by which I can get them to relinquish their rights. If I can do that, that will straighten the title so far as the school board is concerned. Then after that we can get the matter settled between the heirs of Andrew Wiley and yourself. By so doing the land will be in a condition by which you can sell it and a good title can be made. I can prepare the quitclaim from the description in the sheriff's deed. I am of the opinion that this is the cheapest and best plan that I can think of to straighten up that title. Please let me hear from you at your earliest convenience and oblige."

He sent her a letter January 30, 1907, saying:

"I wrote you some time since in relation to the unsettled condition of the title of 160 acres of your home place, and in that letter I suggested to you that it might be well for you to give me a quitclaim deed of your right in that 160 acres. My only object in that was to arm myself in such a way that I could deal directly with the school board. Since writing that letter they have ordered an abstract made of your ranch for the purpose of testing what rights you have in that piece of land. I am going to Salem in a few days for the purpose of appearing before the board on some other business, and while I am there this matter of

yours will come up, and I want to say to the board that I will represent you in any shape that they see fit to attempt to oust you of your rights. I don't care for the deed. I simply want the authority to represent you in the matter. I remember very well what our talk was concerning your writing to each one of the heirs for the purpose of your securing a quitclaim deed from them. We may have to act in this matter before you could possibly secure quitclaim deeds from the Andrew Wiley heirs. I want to prevent if I can the board doing anything that would be detrimental to your interests or to the interests to the Wiley heirs. If you want me to look after your interests before the board, and if you will write me to that effect, I will watch the matter for you, and if there is anything to be done I will look after it promptly. I would like to know what you will quitclaim your interest in the 160 acres of land that was sold to the school board a good many years ago. I simply refer to your interests, and not to the interests of the school board or the interests of the Wiley heirs. If I bought your interests, I would expect to have to buy the interests of the Andrew Wiley heirs in said land, and I would also have to settle with the school board for every right they have in said land. Please let me hear from you at your earliest convenience and oblige."

On the 18th of June, 1907, in a letter which he wrote the plaintiff he said in part:

"I was in Salem yesterday. I saw the Governor, and he showed me a written opinion from A. M. Crawford, the Attorney General, which gave the history of the title of the land claimed by the school board that belonged to the Wiley estate. * * I informed the Governor that I would represent you in said litigation and we would claim the land under adverse possession."

When the plaintiff and her attorney agreed that he should obtain from the state a relinquishment, he wrote and she signed a memorandum which reads:

"Foster, Oregon, Sept. 16, 1907.

"It is hereby understood and agreed by and between Mrs. Elizabeth Wiley and J. J. Whitney that in the event the said J. J. Whitney settles with the state land board and pays said board in full for the south half of the D. L. C. of Andrew Wiley and Lucy Wiley, his wife, the same being notification No. 7630, and claim No. 50, Tp. 13 S., R. 1 east, and claim No. 43, that in that event I promise and agree to pay the said J. J. Whitney the amount of money he pays said board, principal and interest, and the expenses of making said settlement, on or before the 1st day of January, A. D. 1908, and in the event I fail to pay the said J. J. Whitney, as above stated, then in that event I do hereby promise and agree to surrender all right or rights I have to the aforesaid land and premises to the said J. J. Whitney.

ELIZABETH WILEY."

September 27, 1907, the defendant again wrote the plaintiff as follows:

"I have seen and talked with the state land board and I think I can settle with said board in a satisfactory manner. I have notified said board that I would be in Salem on next Wednesday for the purpose of settling said matter. If I get the business straightened up at that time, it will save the state board the necessity of bringing a suit to recover said land."

He wrote her November 10, 1907, saying:

"I settled with the school board for the south half of the D. L. C. of Andrew Wiley and wife, and I took a deed from them for said land. I have made a copy of the map made by the abstractors of the D. L. C. of Andrew Wiley and wife. Inclosed please find the same. You will see from the map how the land is divided. Now, I think that the long narrow strip ought to go with the land I bought of the school board. At least it would put both tracts of land in better shape, provided the ranch is divided. Now I am willing to sell out my interests in said ranch to you, or if we can agree I am willing to buy of you that long nar-

row strip, or if you desire, and we can agree, I am willing to buy the balance of your land which is 160.875 acres. Please let me hear from you, and let me know what you will take for the whole tract of 160.875, or what you will take for the 40.875 acres of land. The strip is about 25 rods wide, and I have been so very busy that it was difficult for me to get time to write to you before. Please let me hear from you and oblige."

December 20, 1907, in another letter to her he states:

"Your favor of recent date at hand and contents noted. I am of the opinion that the best way for you and I is to have our land surveyed. We will then be able to know exactly what each one of us have got. After that is done I will fix a price on my land, and you can if you desire fix a price on yours. I am willing to buy or sell, and I am not particular about that."

The mortgage, it will be recalled, undertook to create a lien upon the undivided half of the entire donation land claim. The United States patent, which was issued after the mortgage was given, granted the north half of the claim to the heirs of Lucy Wiley. Therefore, the lien attached only to the undivided half of the south half of the claim. That was the estate conveyed by the sheriff under the decree of foreclosure, and it was also the measure of the interest granted by the State of Oregon to the defendant J. J. Whitney. Though the plaintiff joined her husband in executing the mortgage, she, upon his death, became vested with a dower estate in an undivided half of the south half of the claim, notwithstanding the decree of foreclosure. The evidence also shows that the plaintiff secured deed from heirs of Andrew Wiley, conveying to her at the times stated all their estate in the entire donation land claim, viz.: Robert Wiley, a son, December 2, 1882; Susan Davidson, a daughter, July 7, 1885; and Amanda Rexford, a daughter, July 5, 1899. The writing which

the plaintiff signed September 16, 1907, agreeing to surrender all her right in the land to the defendant J. J. Whitney if she failed to pay him at the time specified the money which he was to advance for her, was not sealed, witnessed or acknowledged, and hence was insufficient in law to transfer her title in the premises. The reply admits that it was the intention of the mortgagors and of the board of land commissioners to create and accept a lien on the south half of the donation land claim. This avowal is evidently binding upon the plaintiff, but prior to the filing of her final pleading the concession there made had no legal efficacy, so far as disclosed by the evidence.

The defendant J. J. Whitney did not sign the memorandum to which the plaintiff appended her name. His failure to do so is unimportant, for his engagement as her attorney would have enabled her to maintain a suit to redeem the land from his purchase. Their relation as attorney and client was so confidential that her interests in the land could not have been barred except by a strict foreclosure on his part, when the decree would have provided that within a specified number of days her title was to be defeated upon failure to pay the sum of \$1,000, interest, and expenses. The duties and obligations of the plaintiff and the defendant J. J. Whitney were reciprocal, and although she signed the memorandum in question she could have maintained a suit against him to redeem even after January 1, 1908.

The decree complained of is in the main correct. One feature of the final determination has neither averment nor proof to support it. The court awarded the defendant J. J. Whitney \$150 as attorney's fees, probably on the assumption that he was entitled to that sum for negotiating for the relinquishment. No

appeal was taken by the plaintiff from that part of the decree, which in this instance will be allowed to stand as given, since the defendant J. J. Whitney paid some taxes which were a lien on the premises.

The decree will therefore be affirmed, with the proviso that, unless the sum awarded the defendant J. J. Whitney be paid to the clerk of the lower court by or for the plaintiff on or before 60 days from the entry of the mandate therein, all her right, title, interest and estate in and to the south half of the donation land claim be barred and foreclosed.

AFFIRMED ON CONDITION.

Affirmed without condition.

MOTION TO MODIFY DECREE.

(147 Pac. 938.)

Opinion PER CURIAM.

In the former opinion in this cause the plaintiff's right to equitable relief is made to depend upon her payment to the clerk of the lower court, within a designated time, of the sum determined to be due from her to the defendant. The fact was overlooked that the amount of money requisite for that purpose had been so deposited, and the decree is affirmed without condition.

MOTION ALLOWED.

AFFIRMED WITHOUT CONDITION.

Argued February 17, affirmed March 9, rehearing denied April 27, 1915.

CODY LUMBER CO. v. COACH.

(146 Pac. 973.)

Action—Cross-bill in Action at Law—Determining All Issues.

1. Where the cross-bill, in an action at law, states a good cause of suit for equitable relief, and the parties stipulate to submit to equity jurisdiction of the court to try their cause, the court properly proceeds to a determination of all the matters at issue, though the evidence does not support the cross-bill.

Logs and Logging—Contracts—Payments—Readjustment—"Sawmill Tally."

2. Under a contract of sale by W. to C. of standing timber, to be removed by C., providing for payments monthly, for the amount removed, as shown by the log scale, and for adjustment and final determination semi-annually, from the "sawmill tally" (that is, the tally kept at the mill), of the amount removed, C., in whose hands were the cutting, manufacturing and marketing of the logs, having negligently failed to keep or preserve a sawmill tally, cannot have an adjustment, as the court can adopt no other method of measurement than that provided for by the contract, as this would be to make a new and different contract.

From Coos: JOHN S. COKE, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit in equity by cross-bill by the Cody Lumber Company, a corporation, against Arthur T. Coach, Joseph W. Coach and Mary E. Cary. The facts are as follows:

On the 12th day of April, 1913, the defendants herein began an action at law against plaintiff for the collection of seven promissory notes aggregating the sum of \$14,140.81, with interest. Thereafter the plaintiff herein, as defendant in such action at law, filed an answer to the complaint, and then filed its cross-bill in equity, in which are set up, among others, allegations to the effect that the promissory notes, upon which the action at law is based, were executed and delivered in accordance with a certain contract between the parties, which contract is set out in full. This instrument is a

long one, but that portion which is of interest in this discussion reads as follows:

“This agreement made the 25th day of June, 1906, by and between Wm. Coach, the party of the first part, and the Cody Lumber Co., a corporation, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the covenants, agreements and payments hereinafter stipulated to be performed and paid by the said party of the second part, hereby agrees for himself, his heirs, executors, administrators and assigns, to sell said party of the second part all the timber standing and being on the following described premises, situated in Coos County, State of Oregon, and particularly described as follows, to wit: [Description follows.] And to allow said party of the second part to log off and remove the timber on said premises, and hereby granting said party of the second part the right to construct logging roads over and through said premises wherever necessary and convenient in the operation of removing said timber until said timber is removed, under the conditions and terms following, viz.: The said party of the second part to pay said party of the first part one and one-half dollars per thousand feet for all logs and timber removed from said premises under this agreement, and to remove or log off at least twenty million feet each year until said premises are all logged off, and in case said party of the second part fails to remove twenty million feet during any one year, then said party of the second part shall pay said party of the first part the difference between the amount due for the timber actually removed and thirty thousand dollars, either in cash or by notes of said party of the second part, bearing interest at 8 per cent per annum, from date, and to be due three months after the date thereof. Said amounts so paid in cash or by notes not to be considered as a forfeiture but to be credited when paid on future stumpage, the said party of the second part in no case to pay more than one and one-half dollars per thousand for the timber on said described

premises, whether still remaining thereon or removed by said party of the second part. That the payments shall be computed each month from the log scale to be kept when logs are delivered at the river, and at the end of every six months, to wit, on June 30th and December 31st of each year, the adjustment and final determination of the amount of timber removed to said time, under this agreement, shall be determined from the sawmill tally, except in case where the said party of the second part shall sell the logs, in which case the number of feet sold in the log shall be determined by the scale settled for by the purchaser, and that at the end of each year the said party of the second part shall settle in full any differences or amounts remaining unpaid, and every deficit in amount cut as heretofore agreed. It being understood and agreed by the parties hereto that said party of the second part shall pay in cash or by note due in ninety days from date thereof, with interest at 8 per cent per annum from due, for the amount of timber logged off said premises each month as shown by the log scale for said month."

It is then alleged that the notes sued upon are a part of a series of many notes given by the Cody Lumber Company in accordance with the terms of the contract mentioned, for timber scaled each month at the river bank; that many of such notes have been paid, and all of which notes are subject to settlement and adjustment in accordance with the sawmill tally, and the scale actually settled for by purchasers from the Cody Lumber Company; that the total log scale at the river bank was 102,941,657 feet and the total amount of timber removed and logs sold, according to the mill tally and the scale of logs sold, upon which the settlement should be based, was 95,800,108 feet; and that this difference entitles plaintiff to a credit of \$10,712.35 upon the notes which are the subject of this litigation. There are, of course, other allegations in the cross-bill,

but the foregoing is a sufficient statement for this discussion.

To this cross-bill the defendants filed an answer admitting the execution of the contract, and that the notes sued upon were given in payment for the timber scaled each month in accordance with the terms of the contract. It is further alleged therein that many logs were lost in the process of being floated down the river, by becoming detached from the rafts, by being carried out over the bar at the mouth of the river, and by being wrongfully appropriated by another mill; that the contract was entered into by the parties with full knowledge and in contemplation of the fact that it was the usage and custom of the mills in that vicinity to saw more lumber out of the logs than the same would scale at the river landing.

A reply having been filed in which the new matter in the answer is denied, and containing new matter which substantially joins issue with the affirmative allegations of the answer, it was stipulated in open court that plaintiff and defendant submit to equity jurisdiction of the court to try their cause. After a trial upon the issues joined, there was a judgment for the defendants for the amounts prayed for as being due upon the notes in controversy, and plaintiff appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. G. T. Treadgold* and *Mr. Abner Jones*, with an oral argument by *Mr. Treadgold*.

For respondents there was a brief over the names of *Mr. A. J. Sherwood* and *Mr. Lawrence A. Liljeqvist*, with an oral argument by *Mr. Sherwood*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Counsel for plaintiff contends that, when the cross-bill in equity is dismissed, the court has no jurisdiction in either the action at law or the suit in equity, to render a judgment upon matters constituting a cause of action at law, and cites, in support thereof: *Small v. Lutz*, 34 Or. 131 (55 Pac. 529, 58 Pac. 79); *Finney v. Egan*, 43 Or. 3 (72 Pac. 136); *Hill v. Cooper*, 6 Or. 181.

In the case of *Small v. Lutz*, the court simply held that, when the cross-bill does not state facts entitling the plaintiff to equitable relief, the court does not acquire jurisdiction but must dismiss the suit and remand the parties to their legal remedy. Mr. Justice BEAN in this case says:

"If the cross-bill had been sufficient to give a court of equity jurisdiction, as the stipulation assumes, the decree therein determining the rights of the parties would have been conclusive in a law action without any stipulation of the parties to that effect."

In the case of *Finney v. Egan*, 43 Or. 3 (72 Pac. 136), there was no question of the dismissal of a cross-bill involved. The court determined the equitable rights of the parties, but made no decree upon the question of damages, and this court held that, in the absence of injunction, the law action might proceed for the settlement of that issue.

In the case of *Hill v. Cooper*, 6 Or. 181, the question raised here is not in any sense involved.

In the case at bar it is conceded that the cross-bill states a good cause of suit for equitable relief, and the trial court properly exercised its equitable jurisdiction in hearing and determining the issues raised by the pleadings. The court did not dismiss the cross-bill, but, having heard the evidence, proceeded, in accord-

ance with the stipulation of the parties, to a final determination of the matters at issue. We must consider, then, the final judgment of the court, which might perhaps have been more aptly termed a decree, and see whether or not it constitutes a correct determination of the controversy.

2. It may be said without hesitation that the contract provides that any errors, either by way of overestimate or underestimate, caused by inaccuracy in the landing scale of the logs, is to be determined semi-annually from the sawmill tally, except where the party of the second part shall sell the logs, in which case the number of feet sold in the log shall be determined by the scale settled for by the purchaser. Plaintiff contends that this has not been done, and that an accounting had in accordance with this clause of the agreement would entitle it to a deduction of about \$10,712.35 from the amount claimed by defendants as due upon the notes. The evidence discloses that the plaintiff, for a time, conducted a sawmill of its own, in which the logs cut from defendants' land were manufactured into lumber; that this mill was subsequently destroyed by fire, after which the timber was sold to various purchasers in the log, or sawed for plaintiff in the mills of others. The greater portion of the lumber manufactured by plaintiff was shipped to California, and there disposed of, and the measurement thereof, so far as the record shows, was what is termed in the testimony the "association tally," and was made at the various points in California where the lumber was delivered. Plaintiff's evidence tends to prove that the measurement or tally referred to discloses a manufacture of about 28,500,000 feet. The evidence also discloses that the expression "sawmill tally" means the amount of lumber cut, as shown by

the tally made at the mill. The "association tally" is therefore not the tally which was agreed upon by the parties as a basis of settlement. For a court to adopt some other method of measurement than the one specifically provided by the agreement of the parties would be to make a new and different contract from the one entered into by the parties, and that is beyond our power: 9 Cyc. 587. Without the sawmill tally there is no complete record of the quantity of logs cut, except the "landing scale" kept by plaintiff, and therefore no means provided whereby the court could accomplish the accounting and settlement provided for in the agreement. The cutting, manufacturing and marketing of the logs were all in the hands of the plaintiff, and if, by its own negligence, it has failed to comply with the terms of the contract provided for its own protection, it cannot complain if it suffers loss thereby.

There are a number of other questions discussed in the briefs, but, since they are all subordinate to the points herein considered, we deem it unnecessary to enlarge upon them.

The decree of the trial court is affirmed.

AFFIRMED. REHEARING DENIED.

**MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE MCBRIDE concur.**

Argued March 16, cross-bill dismissed April 6, rehearing denied April 27, 1915.

BROWN v. FARMERS & MERCHANTS' NAT. BANK.

(147 Pac. 537.)

Execution—Notice of Sale—Sufficiency and Effect.

1. An advertisement of a sheriff's sale on execution reciting judgment in favor of a creditor against certain debtors, the levy upon all their right, title and interest in the real property described by legal subdivisions, divested the debtors of any title to the property; the use of the name, "Hattie Brown" instead of "Kittie Brown" not vitiating a prior sufficient description, and this independently of Section 241, L. O. L., subdivision 4, which expressly makes a confirmation of sale a conclusive determination of the regularity of the proceedings for sale.

Frands, Statute of—Sufficiency of Evidence—Agreement and Memorandum of Sale.

2. Evidence in behalf of cross-complainant in ejectment claiming under a contract for a conveyance by defendant bank, plaintiff's grantor, held insufficient to prove any written agreement or memorandum to convey the realty, as required by Section 808, L. O. L., subdivision 6.

Specific Performance—Contracts Enforceable—Mutuality.

3. Where there was no such mutuality in the contract to convey as would have entitled the vendor bank to have compelled the cross-complainant as purchaser to pay the purchase price of the land, the alleged contract could not be specifically enforced against the bank.

[As to mutuality of contract, see notes in 7 Am. Dec. 492; 140 Am. St. Rep. 59. As to necessity for and what is mutuality of remedy, see note in 27 Am. St. Rep. 173.]

Vendor and Purchaser—Offer and Acceptance—Withdrawal.

4. An offer to convey realty until accepted is subject to withdrawal without prejudice to the party making it, and where the alleged purchaser knew nothing of the offer, there was no prejudice in its withdrawal, and the vendor was not under obligation to renew the offer.

[As to acceptance of option to purchase land, see note in 118 Am. St. Rep. 597.]

From Douglas: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This suit had its inception in a cross-complaint in equity as a defense against an action in ejectment

brought against Kittie Brown and others by E. V. Weaver, who is a defendant herein. The bill alleges, in substance, that from the death of her father, Henry Wiley, until September 16, 1912, the plaintiff occupied certain lands in Douglas County as the owner thereof by virtue of a devise of the same in his last will and testament; that since that date she has been in the exclusive possession of the premises as vendee under an agreement with the defendant to sell and convey them to her. She traces the history of the title of the defendant bank in the realty in question from the giving of what she alleges was an accommodation note executed and delivered by her and her husband with one Blankenship to the bank October 18, 1905, for \$770, through a judgment on that note against herself and her husband rendered by the Circuit Court of Douglas County on May 16, 1908, upon which execution was issued, the land sold, the sale confirmed June 27, 1911, and a sheriff's deed issued to the bank September 16, 1912. Concerning the notice of the sheriff's sale, she says, in substance, that the lands were advertised "under the name of Hattie Brown," which point will be hereafter noticed. She states that on February 5, 1913, while she was still on the lands under the contract she mentions, the bank attempted to get possession of the premises by virtue of a writ of assistance, which was afterward recalled by the Circuit Court. The following allegations then appear in the complaint:

"Plaintiff further alleges that she was led to believe by the defendant bank, and by its attorney and agent, O. P. Coshaw, that they would redeed said lands first above described to her at any time after said sheriff's deed was made and delivered as aforesaid, upon the payment to the said defendant bank of their demands against her on account of said accommodation note which plaintiff signed as aforesaid, without regard to

the time allowed by law in which to redeem lands from execution sale, and relying upon their said promises in that behalf, the plaintiff let the statutory time for redemption expire without having redeemed said lands from said execution sale; that on the 25th day of October, 1912, and after the statutory time for redemption of said lands had expired, the plaintiff, in accord with the prior promises of the said defendant bank, offered to pay the said defendant bank in full all its demands against the plaintiff by reason of said accommodation note as aforesaid, in consideration for their deed reconveying to plaintiff said first above-described lands, and on the 6th day of November, 1912, while the said defendant bank was seised and possessed of said lands as above set forth, the said bank entered into a contract agreement to and with plaintiff, wherein and whereby it accepted the plaintiff's offer to pay all their demands as above stated, and in that behalf agreed to accept in full therefor the sum of \$1,348.66, with interest at 8 per cent per annum from said 6th day of November, 1912, until paid, and in consideration therefor the said defendant bank would make, execute and deliver their deed for said lands first above described to whomever the plaintiff designated, and in that behalf and with that purpose in view the said defendant bank did, on or about the 25th day of November, 1912, make and execute their deed to said lands, and on the 30th day of November, 1912, deliver the same in escrow with the Douglas National Bank, of Roseburg, Oregon, with directions to said bank to deliver the same to the plaintiff or her agent, as per the terms of their said agreement above mentioned, upon the payment to said bank of the sum of \$1,348.66, with interest thereon from November 6, 1912; that the plaintiff took and held possession of said first above-described lands under and pursuant to said contract agreement of purchase and sale aforesaid, and has ever since been, and is now, in the exclusive possession thereof, and has made improvements thereon, and by virtue of said agreement has farm let the same to the said J. A. Coplen, the defendant mentioned in the ejectment action against

which this suit is filed, for a term of three years from last fall, the year 1912."

She alleges that she duly performed "all the conditions of said contract agreement of sale and purchase" upon her part to be kept and performed, and at divers times tendered to the defendant bank through its attorney the full amount of all its demands against the plaintiff by reason of said accommodation note, and demanded a deed, without receiving the same. She avers other tenders on May 6, 1913. Her prayer is to the effect that a deed made by the defendant bank to the defendant Weaver, whom she alleges took with knowledge of her rights, be canceled or that he be held to be her trustee of the land; that he execute to her a deed on payment of the amount that would be due the bank on its note and judgment up to the time of the tender to Weaver; and that the defendants be adjudged to account to her for damages in the sum of \$8,500. The defendants answering separately admit the plaintiff's original title in the land, the execution by her and her husband of the note in question, the commencement of the action against her, the rendition of the judgment mentioned, the execution, sale, confirmation and succeeding deed, the issuance of the writ of assistance and its recall; but deny every other allegation of the complaint. The Circuit Court, after a hearing, entered a decree to the effect that out of money tendered into its registry by the plaintiff there be paid to the defendant bank the sum of \$1,535.34, and that within 20 days from such payment the defendants execute and deliver to the plaintiff a deed reconveying to her the land in question, in default of which the decree should stand for a deed. The defendants have appealed.

CROSS-BILL DISMISSED. REHEARING DENIED.

For appellants there was a brief with oral arguments by *Mr. Oliver P. Coshow* and *Mr. A. N. Orcutt*.

For respondent there was a brief over the names of *Mr. Benjamin F. Jones* and *Mr. Commodore S. Jackson*, with an oral argument by *Mr. Jones*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The admitted history of the case reveals the execution of the note to the bank, action thereon against the plaintiff and her husband in the Circuit Court of Douglas County, personal service of summons upon them, judgment for want of an answer, execution upon the judgment, sale in pursuance thereof, confirmation of sale, and, after the expiration of a year, there being no redemption, a sheriff's deed conveying the land to the defendant bank.

1. The plaintiff's criticism of the notice of sheriff's sale is not well founded. The advertisement recites the judgment in favor of the bank against *Kittie Brown* and *C. W. Brown*, defendants, and the levy upon "all the right, title and interest that the said *Kittie Brown* and *C. W. Brown*, defendants aforesaid, or either of them, had on the 16th day of May, 1908, or have had at any time since, or now have," in the real property in dispute which is described in the notice by legal subdivisions. The announcement then goes on with this language:

"Said land being the identical tract devised and granted to the said *Hattie Brown* by the last will and testament of *Henry Wiley*, deceased."

The reference to the judgment and the recital of the levy, together with the description by legal subdivisions of the land, all as the property of *Kittie Brown*

and C. W. Brown, is enough in that respect to carry the title of the plaintiff here in the property, and the use of the name "Hattie Brown" does not vitiate the previous sufficient description. . Indeed, in the trial of the case at bar and in the argument no reliance was made upon that point. Besides all this, in the language of our Code, the confirmation of sale was a "conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action, suit, or proceeding whatever": Section 241, subd. 4, L. O. L.

As before stated, the sale of the plaintiff's property culminated in a sheriff's deed September 16, 1912. That instrument operated as a matter of law to utterly divest her of her title to the realty in question. To establish any further or subsequent hold on the premises, she must allege and prove a valid contract with the then holder of the title to convey the same to her which she is entitled to have specifically performed. Without discussing the sufficiency of her narration about such a contract, but giving it its full value in her favor, she must, in order to recover in this proceeding, prove an agreement complying with the statute on such subjects together with performance or a valid offer to perform while such a contract was in force. Section 808, L. O. L., thus fixes the standard of evidence applicable:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * (6) An agreement for the leasing, for a

longer period than one year, or for the sale of real property, or of any interest therein. * * "

In one portion of her complaint she alleges that from September 16, 1912, the date of the sheriff's deed, she had been in possession of the lands under an agreement between her and the bank to sell the same to her; and in another portion she says, as quoted above, that the agreement was entered into November 6, 1912.

The business was conducted mainly by means of correspondence. On October 25, 1912, one C. I. Leavengood wrote to the defendant bank the following letter:

"Myrtle Creek, Oregon, October 25, 1912.

"Farmers & Merchants' Natl. Bank, El Dorado, Kansas—

"Dear Sirs: As attorney for Kittie Brown, from whom you secured a judgment some years ago, and on whose property you hold a sheriff's deed, I wish to know if you will accept the full amount of judgment, with costs and interests in cash, and release the property. I asked Mr. Coshow, your attorney, to make this inquiry, but he is so busy in politics that it may have escaped his notice or attention. This judgment was taken in default without the parties having been advised as to exemptions and both Mr. and Mrs. Brown were sick and in bed at the time when the action was brought. While it would appear from the will filed recently that Mrs. Brown has only a life estate in the land, yet if we can discharge the debt as above stated, I believe we can raise the money on 10 days' notice. An early reply will greatly oblige,

"C. I. LEAVENGOOD."

The answer of the bank here follows:

"El Dorado, Kansas, Nov. 6, 1912.

"Mr. C. I. Leavengood, Myrtle Creek, Oregon:

"Yours of the 25th of Oct. at hand in regard to Kitty Brown property in which you offer to pay us what is due for redemption, and the directors have authorized

me to say to you that the consideration in deed is \$1,110.23; our attorney's fees and cost paid \$123.31, \$1,233.54. Interest from Sept. 6, 1911, \$115.12; total to Nov. 6, 1911, \$1,348.66. Now, if you will pay us \$1,348.66 and interest from this day at 8 per cent until paid we will make the deed to whoever Kitty Brown wishes. She seems anxious to get out of paying us, but still we ask nothing but the debt.

"Yours truly,

"WM. I. SHRIVER,

"Cashier."

The reply of Leavengood is here quoted:

"Myrtle Creek, Ore., Nov. 12, 1912.

"Wm. I. Shriver, Cashier, El Dorado, Kansas—

"Dear Sir: Please execute deed to C. I. Leavengood and send to Douglas National Bank, Roseburg, Oregon, with whom I have arranged to send you check for \$1,348.66 and interest from Nov. 6, 1912, at 8 per cent. It was necessary for me to give personal security to obtain the amount and as I will be obliged to sell a part of the farm in order to reimburse the bank the title is my only security. Should you doubt my authority make an order from Kitty Brown a condition precedent to its delivery from Douglas National Bank to me.

Yours truly,

"C. I. LEAVENGOD."

On November 25, 1912, the defendant bank wrote to the Douglas National Bank of Roseburg, inclosing a deed to Leavengood with instructions to deliver it to him on payment of \$1,490.66, stating that he had offered to pay their claim and expenses which they had concluded to accept, but had made a mistake in computing the amount, and consequently demanded the greater sum. They close their letter with this language:

"We have added that amount to our estimate of claim in the deed and must have the full amount. We feel that Mrs. Brown did everything she could to avoid

paying us and when we find we have a property more valuable than our claim, she should be proud to make us whole. If this price is not satisfactory with them, please return us the deed."

Leavengood then wrote the defendant bank the following letter:

"Myrtle Creek, Oregon, Dec. 16, 1912.

"Farmers & Merchants' National Bank, El Dorado, Kansas—

"Dear Sir: Doubtless you are wondering why the money is not forthcoming in the matter of deed sent in escrow to Douglas National Bank at Roseburg. Well it is about the same old story of crooked intent on the part of Kittie Brown. I have been her attorney in probaton for her father's will, and after she received notice from Mr. Coshow, as your attorney, to vacate on ranch, she realized she was in trouble and for a stipulated fee offered by her I undertook to secure back the place and to sell off sufficient to pay off your claim and my fee. After she learned I had succeeded in both—or have a buyer for the hill portion on west of road who offers sufficient to pay all indebtedness, she disclaims her offer, which was made in presence of the county judge and others. I have asked Mr. Coshow to write to you asking that her consent to delivery of deed be not required, but he seems either to be unwilling or too busy to write. Her idea is to evade paying any debt and in this as well as in your own case has shown her dishonesty. My action in the matter was solely as an attorney and for a stipulated fee, and as to my integrity and honesty we refer to any business firm or bank at Roseburg or the Citizens' State Bank at this place. Trusting that no other arrangements will be made nor the deed recalled until you have investigated, as my money is ready at bank.

"Yours truly,

"C. I. LEAVENGOOD."

On receipt of this communication from Leavengood the defendant bank addressed the following letter to the Douglas National Bank:

"El Dorado, Kansas, December 24, 1912.

"Douglas National Bank, Roseburg, Oregon—

"Dear Sir: Please return a deed sent you by us to C. I. Leavengood about Nov. 6, 1912, as we are informed they cannot comply. Return at once and oblige.

WM. I. SHRIVER,
"Cashier."

In pursuance of this letter the deed was returned as requested. Other negotiations were had, but no agreement was reached on the subject, and finally on March 31, 1913, the bank conveyed the property to the defendant Weaver, who instituted the ejectment action already mentioned.

The plaintiff herself says that the first negotiation had with the bank was the letter written by Leavengood October 25, 1912, a date more than a month after the execution and delivery of the sheriff's deed. Part of her cross-examination is here set down:

"Q. Did you ever tender the money to the bank while the deed was here to take up the deed?

"A. I did not have any money to tender while the deed was here. I think the deed had gone back before then.

"Q. Now, in order to be clear on this matter, Mrs. Brown, as I understand you that personally or up to the time you went to Kansas in March, 1913, you had no personal correspondence or arrangement between yourself or the Kansas bank as to the repurchasing of this property, is that true?

"A. No, sir.

"Q. That is true, is it?

"A. I do not understand what you mean.

"Q. (Question read to witness.)

"A. No, sir; I did not.

"Q. And all the negotiations were carried on between Mr. Leavengood and the bank, is that correct?

"A. Until I went to Kansas?

"Q. Yes, up to the time you went back there in March.

"A. Yes, that is all there was just between Leavengood and the bank.

"Q. So that whatever contract or agreement you had with the bank up to that time is included in the letter that passed between Mr. Leavengood and the bank? Is that right?

"A. That is all there was done, just what was done between Mr. Leavengood and the bank.

"Q. You say that pursuant to those arrangements that you went into possession of this land under your agreement with the bank?

"A. Yes, sir.

"Q. It is not a fact, then, that you went into possession under your agreement with the bank to repurchase at the date that the sheriff's deed was made to the bank?

"A. I cannot tell you anything about those dates.

"Q. That was September 12, 1912. Now these arrangements were all after that time, were they not, Mrs. Brown?

"A. I cannot remember the dates. There is too many dates for me to remember.

"Q. Had the bank made you any promises before that Leavengood correspondence in regard to what they would do?

"A. No.

"Q. In regard to this land?

"A. No. * *

"Q. Your only relations with the bank was through Mr. Leavengood and what you did personally while you were in Kansas?

"A. Yes, sir.

"Q. Why didn't you redeem from the sheriff's sale before the year for redemption had expired?

"A. I couldn't get the money."

The plaintiff testified that she had an interview with the bank in El Dorado, Kansas, on March 29, 1913, On that point her evidence here follows:

"Q. Now, referring a moment to this trip which you say you made to Kansas, I think you testified that the bank there sent you back to Mr. Coshow to fix up some papers?

"A. They said to come out here and settle with Mr. Coshow.

"Q. Did you do it?

"A. I came out here and they were putting us out of the house.

"Q. Did you go back and see Mr. Coshow at all?

"A. I do not think that I came back to Mr. Coshow's office.

"Q. Did they put you out of the house?

"A. No, sir.

"Q. Did you go back to Mr. Coshow?

"A. No, sir.

"Q. You never have since then?

"A. No, sir; I didn't suppose it was necessary."

Further, on the subject of the deed sent by the defendant to the Douglas National Bank, her testimony is:

"Q. State when you first knew that the deed that had been deposited in escrow in the Douglas National Bank had been returned.

"A. Mr. Coshow told me that it had gone back that night that I went there to see him. That is the first I knew of it.

"Q. That is when you came down in answer to the summons in regards to the writ of assistance?

"A. Yes, in regard to the writ of assistance."

2. The utmost that can be claimed by the correspondence between Leavengood and the bank upon which plaintiff relies to prove her allegation of the contract to sell her the land is that there was an offer of the bank to convey the property to Leavengood with the consent of plaintiff. She herself says she knew nothing of the deed tendered to Leavengood until after it had been returned. The offer had then

been withdrawn, and it is inconceivable that she could have been a contracting party to something of which she was in total ignorance. In short, there is no situation disclosed by the testimony in which the bank could have tendered to the plaintiff a deed for the property at any time and have successfully compelled her to pay the purchase price.

3, 4. The first tender which she made, as disclosed by the testimony, was in writing of date May 6, 1913, which was long after the bank had recalled the deed it had tendered to Leavengood and had conveyed the property to Weaver, on March 31, 1913. The offer of the bank having been withdrawn, as already noted, it was at an end. It is hornbook law that until an offer has been accepted it is open to withdrawal without prejudice to the party making it. The plaintiff herself says she knew nothing of the offer; hence she could not have accepted. Having withdrawn it under these circumstances, the bank was under no obligation whatever to renew it. It is in evidence that some time in March, 1913, through its attorney, the bank endeavored to get the plaintiff and her husband to attorn to it and acknowledge its title; but they refused to do so. It cannot be that she could be contracting with the bank for the purchase of the property and at the same time deny its title. The testimony utterly fails to establish any contract the specific performance of which could be enforced against the bank, for the very good reason that the bank could not at any time have compelled the plaintiff to pay the purchase price of the land. There must be mutuality in any contract to make it enforceable. It may be that in the beginning the plaintiff received nothing of the proceeds of the accommodation note which she signed, but the bank was not to blame for that. The transaction has been long

drawn out and the burden of interest and expenses has largely increased. The plaintiff has shown no effort to liquidate the claim until after her title in the property had been utterly extinguished by sheriff's deed. She recounts efforts after that to obtain a purchaser for the land who would take up the defendants' claim, but admits they were all unsuccessful; and the first actual offer to pay anything to the bank was made after it had sold the property.

While the circumstances viewed from the plaintiff's standpoint suggest the exercise of magnanimity in her favor beyond the confines of law and equity, the record presents no feature which the court can consider as a basis for nullifying the title of the defendants to the land. The cross-bill must be dismissed.

CROSS-BILL DISMISSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON CONCUR.

Argued April 16, affirmed April 27, 1915.

SKELTON v. NEWBERG.*

(148 Pac. 53.)

Equity—Remedy at Law—Adequacy.

1. Where a judgment in condemnation proceedings has no legal force, the owner whose land was sought to be taken has adequate remedy at law to recover possession of the property wrongfully taken by plaintiff in the condemnation.

Quieting Title—Adequacy of Remedy at Law—Cloud on Title.

2. An owner whose land has been taken under an illegal judgment in eminent domain proceedings may resort to equity to remove the cloud cast on his title thereby.

*The authorities passing upon the effect of remedy at law upon equitable jurisdiction to remove cloud on title are reviewed in a note in 12 L. R. A. (N. S.) 49.

REPORTER.

Appeal and Error—Equitable Relief—Presumptions.

3. The court, in a suit against a city to remove a cloud from title and to enjoin enforcement of a judgment condemning land of plaintiff, must, in the absence of a bill of exceptions in the condemnation action, assume that testimony was received on the issues of necessity for taking, and inability of the parties to agree on compensation, constituting conditions precedent to maintenance of eminent domain proceedings.

Eminent Domain—Proceedings—Verdict—Sufficiency—"General Verdict."

4. A verdict awarding compensation in condemnation proceedings by a city under Sections 6859, 6860, 6862, 6866, 6871, 6874, L. O. L., regulating the procedure in eminent domain proceedings, and empowering the city to condemn property, is a "general verdict," within Section 152, defining a "general verdict" as that by which the jury pronounces generally on all of the issues in favor of plaintiff or defendant, and is a finding for the city on the issue of necessity for the taking, and inability of the parties to agree on compensation, and sustains a judgment of condemnation.

Eminent Domain—Trial—Verdict—Sufficiency.

5. Where an action to condemn real estate is tried as any other action at law by a jury, the verdict, in the absence of a statute commanding it, need not describe the property taken.

Judgment—Entry—Time of Entry—Statutory Provisions.

6. Section 201, L. O. L., providing that the judgment shall be entered by the clerk within the day on which the verdict is returned, is directory only, and a judgment in condemnation proceedings entered 24 days after verdict is valid, within Section 6860, providing that an action to condemn land shall be commenced and proceeded to final determination as an action at law, except as otherwise specially provided.

Eminent Domain—Compensation—Constitutional and Statutory Provisions.

7. Article I, Section 18, and Article XI, Section 4, of the Constitution, declaring that private property shall not be taken for public use without compensation being first made or secured in such manner as may be prescribed by law, permit the legislature to enact Sections 6871, 6874, L. O. L., authorizing issuance by a city of an order on its treasurer to pay compensation awarded in condemnation proceedings, and an order issued by a city condemning land is sufficient.

From Yamhill: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by George P. Skelton against the City of Newberg, a municipal corporation, to remove a cloud from the title of real property and to enjoin the

enforcement of a judgment, condemning 17.8 acres of the plaintiff's land, with a spring thereon, and the right to all the water flowing therefrom to be used by the city and its inhabitants. A demurrer to the complaint on the ground that it did not state facts sufficient to authorize equitable intervention was sustained, and the plaintiff declining further to plead, the suit was dismissed, and he appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Isaac H. Van Winkle*.

For respondent there was a brief over the names of *Messrs. McCain, Vinton & Burdett, Mr. Clarence Butt* and *Mr. C. R. Chapin*, with oral arguments by *Mr. J. E. Burdett* and *Mr. Butt*.

Opinion by MR. CHIEF JUSTICE MOORE.

It will be sufficient to refer to the alleged irregularities in the condemnation action whereby it is asserted that the judgment rendered therein is invalid, without setting forth the averments of the complaint herein. Copies of the pleadings in that action are made parts of the complaint in the case at bar. In the condemnation action the complaint was in the usual form, particularly describing the land and easement sought to be appropriated, alleging that the City of Newberg was expressly empowered, by an act incorporating such municipality, to condemn private property for a public use, and that it was necessary that the plaintiff should acquire the rights of the defendants, George P. Skelton, Virginia K. Skelton, his wife, and J. J. Jordan, in and to the spring, the stream flowing therefrom, and the real property specified, and that proper agents of the City of Newberg were unable

to agree with the defendants as to the compensation to be paid for the appropriation. The answer admitted most of the averments of that complaint, denied the necessity for the appropriation and the failure of the parties to agree upon the sum of money to be paid therefor, and alleged that the land and easement involved were of the value of \$8,000. The reply denied the averments of new matter in the answer, and alleged that the property sought to be condemned was not worth more than \$1,000. Predicated on these issues the cause was tried and on April 1, 1911, a verdict was returned as follows: "We, the jury in the above-entitled cause, hereby assess the damages to the defendants herein in the sum of \$2,000." Thereupon all further proceedings in the action were postponed, and a recess was taken until the 25th of that month, when the court, reconvening, caused an entry to be made in its journal to the effect that the case came regularly on for hearing upon the plaintiff's motion for judgment on the verdict, whereupon it was found that the City of Newberg had paid the award by its order duly drawn upon the municipal treasurer for \$2,000 in favor of the defendants, which order had been deposited for them with the clerk of the court, and thereupon it was considered, ordered and adjudged that all the rights of the defendants in and to Skelton Spring, the stream flowing therefrom, and the premises, particularly describing them, were appropriated by the City of Newberg for the purpose of furnishing the municipality and its inhabitants with a supply of pure water. The complaint herein alleged that from such judgment the defendants took and perfected an appeal, but by reason of the failure of their attorney to file in this court a brief within the time prescribed, and without

the fault or knowledge of either of the defendants, the appeal was dismissed April 1, 1912, and this suit was instituted.

It is maintained that equity will enjoin the taking of private property for a public use, unless the proceedings employed for that purpose have strictly conformed to the requirements of the statute relating thereto; and this being so, the failure of the court accurately to observe all the provisions of the legal mandate in the condemnation action renders the judgment given therein void. The alleged errors relied upon to set such proceeding aside, are: That issues having been made as to the necessity for the appropriation and the inability of the parties to agree upon the compensation to be paid therefor, no finding was made thereon by the jury; that they did not unequivocally find that the defendants were entitled to the damages specified; that the verdict did not explicitly, or by reference to the pleadings, describe the real property condemned; that the judgment was not entered within the day the verdict was returned; and that the municipal order issued by the City of Newberg on its treasurer was not a payment of the sum awarded.

Considering these questions in the order stated, we find a text-writer remarks:

"It is now, almost universally, held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the Constitution and the law. If the just compensation has not been paid, or deposited as required by law, or if the proceedings under which the right to enter is claimed are invalid for any reason, an entry will be enjoined": Lewis, Em. Dom. (3 ed.), § 901.

This author further observes:

“No relief can be had in equity on account of mere error in the proceedings for condemnation. The proper course in such cases is to appeal. If the right to appeal has been lost by fraud or mistake, equity might interfere in a proper case”: *Id.*, § 934.

1, 2. It will be assumed that the complaint herein states facts sufficient to authorize a resort to equity, thereby necessitating an investigation of the condemnation proceedings in order to determine whether or not the provisions of the act, regulating the procedure in such cases, have been observed. If the judgment rendered in that action has no legal force or binding effect the plaintiff undoubtedly has an adequate remedy at law to recover possession of his property, if it has been wrongfully taken or retained by the power of eminent domain: *Illinois Central R. R. Co. v. Hoskins*, 80 Miss. 730 (32 South. 150, 92 Am. St. Rep. 612); *Robinson v. Southern California Ry. Co.*, 129 Cal. 8 (61 Pac. 947); *McClinton v. Pittsburg etc. Ry. Co.*, 66 Pa. 404. In this suit, however, a part of the relief sought by the bill is the removal, from the title to the plaintiff's real property, of the cloud cast thereon by the alleged invalid judgment, to obtain which redress a court of equity alone can afford the proper remedy: *Teal v. Collins*, 9 Or. 89; *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. 662); *McLeod v. Lloyd*, 43 Or. 260 (71 Pac. 795, 74 Pac. 491); *Mount v. McAulay*, 47 Or. 444 (83 Pac. 529).

3-5. The statute regulating the procedure in condemnation actions declares that whenever any corporation authorized to appropriate lands or easements therein is unable to agree with the owner thereof as to the compensation to be paid therefor, such corporation may maintain an action for the purpose of having the

lands and easement appropriated to its own use and for determining the compensation to be paid therefor: Section 6859, L. O. L. The complaint in such action shall describe the land, right or easement sought to be taken with convenient certainty: Id., § 6862. The defendant in his answer may set forth any legal defense he may have to the appropriation of the real property, and may also allege the true value of the land and the damages resulting from the appropriation thereof: Id., § 6864. The action shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided: Id., § 6860. Upon payment into court of the damages assessed by the jury, judgment shall be given appropriating the lands condemned to the corporation: Id., § 6866. A municipal corporation authorized and seeking to make an appropriation may proceed, in the mode prescribed in this act, to have such property taken and the compensation therefor estimated and paid, and not otherwise, except that the compensation is to be paid by the deposit in court of an order duly drawn upon the city treasurer for the amount of the compensation: Id., §§ 6871, 6874. Another statute relating to all actions provides generally that if a trial is had by a jury, judgment shall be given in conformity therewith and entered by the clerk within the day on which the verdict is returned: Id., § 201.

It is argued by plaintiff's counsel that, since the jury made no findings that the parties to the action were unable to agree as to the amount of the compensation to be paid for the property to be appropriated, no valid judgment could have been rendered on the verdict in the condemnation proceedings. In *Oregonian Ry. Co. v. Hill*, 9 Or. 377, 382, Mr. Chief Justice LORD, in speaking of actions for condemnation, says:

"The initiate of the proceeding lies exclusively with the corporation, and then only when the parties are unable to agree as to the compensation to be paid for the land sought to be appropriated. But when that fact is made to appear in the complaint, accompanied with a sufficient description of the land, the essential requirements of the statute in regard to the complaint have been complied with. The owner then may set up any legal defense to the appropriation of the land, or, omitting such defense, may * * aver the true value of the land, and the damages resulting from the appropriation thereof."

The issues made in the condemnation action and to be considered by the jury were distinct as to the necessity for the appropriation and the amount of the compensation to be paid therefor. In all cases, except controversies between railroads as to the places and manner of their intersection, a proceeding to appropriate land is to be tried by a jury: Sections 6859, 6860, L. O. L. No bill of exceptions in the condemnation action has been brought up in this case, and, in the absence of such authenticated record of the trial of the cause, it will be taken for granted that testimony was received with respect to the issues of necessity for the appropriation and the inability of the parties to agree upon the amount of the compensation to be paid therefor: *Woods v. Courtney*, 16 Or. 121 (17 Pac. 745). The jury are presumed to have found every material allegation in the complaint in favor of the plaintiff: *Torrence v. Strong*, 4 Or. 39; *Reed v. Gentry*, 7 Or. 497; *Shmit v. Day*, 27 Or. 110 (39 Pac. 870). The verdict hereinbefore quoted was not special, but the jury pronounced generally upon all the issues: Section 152, L. O. L.; 29 Am. & Eng. Ency. Law (2 ed.), 1002. Every reasonable inference deducible from the pleadings and responsive to the issues was

thereby established: *Foste v. Standard Ins. Co.*, 34 Or. 125 (54 Pac. 811).

In proceedings to establish a county road, whereby an easement in private property is sought to be appropriated to a public use, the board of county road viewers must meet, survey and mark out the proposed route, and also make and file a report showing certain particulars: Sections 6281-6288, L. O. L. In cases where viewers or commissioners are appointed to ascertain and report as to some facts required to be established as a condition precedent to the exercise of the right of appropriation, it is usually held that their statement in writing should describe the premises to be taken: *Lewis, Em. Domain* (3 ed.), § 762. Where, however, an action to appropriate real property is tried as any other action at law, by a jury, it is not necessary, in the absence of a statute commanding it, that the verdict should describe the premises taken. Thus in an action for the condemnation of land, involving several issues, a verdict is sufficient in form which finds in effect that the defendant is entitled to damages in the sum named therein: *Oregon Ry. Co. v. Bridwell*, 11 Or. 282 (3 Pac. 684); *Oregon R. & N. Co. v. Taffe*, 67 Or. 102 (134 Pac. 1024, 135 Pac. 332, 515).

In the condemnation action referred to, it will be remembered that the jury assessed "the damages to defendants herein, in the sum of \$2,000." From an examination of the language employed in the verdict, when construed in connection with the averments of the pleadings, there can be no doubt that it was the purpose of the jury to assess the damages in favor of the defendants, thereby determining the necessity for the appropriation of the entire premises described in the complaint, and the failure of the parties to agree upon the amount of the compensation to be paid.

"Verdicts," says a text-writer, "are not to be construed as strictly as pleadings, but are to have a reasonable intendment and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt as to their import, from immateriality of the issue found, or their manifest tendency to work injustice": 29 Am. & Eng. Ency. Law (2 ed.), 1022.

Such being the case, the verdict in the condemnation action under consideration is sufficient.

6. The judgment appropriating the premises and easement not having been rendered in accordance with the finding of the jury or entered by the clerk within the day on which the verdict was returned, it is insisted that jurisdiction of the cause was thereby lost. The statute providing that an action to condemn land "shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided," was enacted in 1862: Section 6860, L. O. L.

In *Postal Tel. Cable Co. v. Southern Ry. Co.* (C. C.), 89 Fed. 194, in construing clauses of the Code of North Carolina, which ordained the manner of condemning rights of way by telegraph companies, and provided that the subsequent proceedings in certain particulars should be as prescribed in the chapter for condemning lands to the use of railroads, it was held that such reference incorporated into the telegraph statute the provisions of the railroad statute referred to only as they existed at the time of the enactment, and not as thereafter amended, and that the telegraph law was not affected by amendments of the railroad law relating to the contents of the petition or matters preceding its filing, such matters being separately covered by the telegraph law itself. In deciding that case the court says:

“The general rule unquestionably is that, when a statute refers to and adopts an existing law, its purport is confined to the law as it then exists, and does not embrace or include any subsequent modification of it.”

To the same effect is the case of *State v. Caseday*, 58 Or. 429, 445 (115 Pac. 287, 294), where Mr. Justice BURNETT, discussing this question, observes:

“It is a rule of statutory construction in this state that, where the provisions of one statute are incorporated into another by mere reference, a subsequent change in the former will not disturb the terms of the latter.”

By the rule thus announced the entry of a judgment was required to be made within two days from the time the verdict was returned. When, however, a motion for a new trial was interposed, within the time prescribed, the recording of the judgment was thereby delayed until the motion was disposed of: B. & C. Comp., § 201. It does not appear from the transcript before us that any motion of that kind was filed in the condemnation action. The statute prescribing the time within which a judgment must be entered was amended February 25, 1907, so as to read:

“If the trial be by jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned”: Section 201, L. O. L.

The object of this latter enactment was evidently to fix the time when an oral notice of appeal should be given, and also to impress a lien upon property when a verdict against the owner thereof was returned: *Barde v. Wilson*, 54 Or. 68 (102 Pac. 301); *Gearin v. Portland Ry., L. & P. Co.*, 62 Or. 162 (124 Pac. 256); *Casner v. Hoskins*, 64 Or. 254 (128 Pac. 841, 130 Pac.

55); *Stricker v. Portland Ry., L. & P. Co. (Or.)*, 144 Pac. 1193. The amendment referred to was undoubtedly designed to enable a judgment creditor to secure his demand which had been established by the verdict against the adverse party. No penalty is attached or forfeiture prescribed for a failure to give or enter a judgment within the day the verdict is returned.

"Statutes," says Mr. Black, "requiring that judgment shall be entered within a limited time after the rendition of a verdict or other determination of the cause are generally directory only, so that the validity of the judgment is not affected by failure to comply with them": 23 Cyc. 839.

We conclude, therefore, that Section 201, L. O. L., as amended, is not mandatory, and that the delay of 24 days in giving and entering the judgment after the verdict was returned was not so unreasonable as to deprive the court of power to determine the matter.

7. It is contended that the statute (Sections 6871 and 6874, L. O. L.) authorizing the issuance of a municipal order by the City of Newberg upon its treasurer for \$2,000 and payable to the defendants in the condemnation proceedings, contravenes provisions of the fundamental law of the state, regulating the payments of compensation in cases of appropriations of property. The clauses of the organic act referred to, as far as material, read:

"Private property shall not be taken for public use,
• • without just compensation; nor except in case of the state, without such compensation first assessed and tendered": Article I, Section 18 of the Constitution of Oregon.

"No person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law": Article XI, Section 4 of the Constitution.

From an examination of the latter clause it will be seen that the legislative assembly is empowered to provide for the securing of the payment of compensation for condemnation of property. The fundamental law having expressly granted such authority, its exercise, as evidenced by the sections of the statute referred to, is valid, and the order issued by the City of Newberg is a sufficient compliance with the enactments, since no complaint is made that the order is not worth its face value: *Crane v. Oregon R. & N. Co.*, 66 Or. 317 (133 Pac. 810).

Having carefully examined the averments of the complaint in the case at bar, we conclude that the bill did not, and could not, from the questions involved, state facts sufficient to authorize equitable intervention, and such being the case, no error was committed in overruling the demurrer. It follows that the decree should be affirmed, and it is so ordered. **AFFIRMED.**

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS CONCUR.

Argued April 15, reversed April 27, 1915.

OREGON LUMBER & FUEL CO. v. HALL.

(148 Pac. 61.)

Appeal and Error—Judgments Appealable—Default Judgment.

1. While an appeal will lie from a void decree when taken by default, it will not lie from one which is merely voidable or erroneous.

Mechanics' Liens—Action to Foreclose—Default Judgment—Pleading to Support.

2. In a suit to foreclose a mechanic's lien, a default decree, foreclosing a trust company of all interest in the property, was void, where the allegation only stated it claimed some interest in the property, but failed to define it.

Mechanics' Liens—Claim—Statement of Nature of Material.

3. A notice of lien, not stating the nature of the materials furnished, was sufficient.

From Multnomah: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

The Oregon Lumber & Fuel Company, a corporation, brought a suit against May Garland Hall and others to foreclose a materialman's lien upon lot 15, block 84, in Laurelhurst Addition to the City of Portland, making the appealing defendant Title & Trust Company and the other defendants, who also claimed liens upon the property, parties. The only allegation in the complaint as to the interest of defendants is the following:

“That said defendants, May Garland Hall, Home Construction Company, a corporation, Title & Trust Company, Laurelhurst Company, a corporation, Frank Masson, Pioneer Paint Company, Northwest Door Company, a corporation, Hawthorne Bracket Company, a corporation, Henry Brown, Nottingham & Co., a corporation, G. E. Maxwell, L. McReynolds, T. Bellingier, J. W. Butler, Geo. Blackburn, and J. Bauer, claim an interest in and to said property, and that they be required to set up such interests as they may have.”

The defendants Pioneer Paint Company and Portland Hardwood Floor Company appeared and filed separate answers, which were served upon the appealing defendant Title & Trust Company; each containing substantially the same allegations in respect to the nature of appellant Title & Trust Company's claim as appeared in the original complaint. Said appellant made default, and the case went to trial as to the other parties, resulting in decree whereby appellant Title & Trust Company was foreclosed of all interest in the

property. Subsequently it appeared and moved to open up the default, which being denied, it appeals. There is also an appeal from the original decree by May Garland Hall, but upon what ground it is taken does not appear.

REVERSED.

For appellant and defendant Title & Trust Company, there was a brief over the names of *Messrs. Bronaugh & Bronaugh* and *Mr. Franklin F. Korell*, with an oral argument by *Mr. Earl C. Bronaugh*.

For respondents Oregon Lumber & Fuel Company and others, there was a brief over the names of *Messrs. Sheppard & Brock* and *Mr. M. M. Matthiessen*, with oral arguments by *Mr. C. A. Sheppard* and *Mr. Matthiessen*.

For respondents Portland Hardwood Floor Company and others, there was a brief over the name of *Messrs. Lewis & Lewis*, with an oral argument by *Mr. Arthur H. Lewis*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. It is settled in this state that while an appeal will lie from a void decree when taken by default, it will not lie from one which is merely voidable or erroneous: *Smith v. Ellendale Mill Co.*, 4 Or. 70; *Trullenger v. Todd*, 5 Or. 36; *Askren v. Squire*, 29 Or. 228 (45 Pac. 779).

2. The decree in this case is absolutely void as to appellant Title & Trust Company. By a failure to answer it admitted the allegations of the complaint, which were that it claimed an interest in the property. There was no allegation as to the nature of the claim

or as to its rank with respect to plaintiff's demand—just the bald statement that it claimed some interest. The case of *Short v. Nooner*, 16 Kan. 220, is precisely in point here. Short brought a suit to foreclose a mortgage given by Fletcher and wife, and made Nooner a party by the following allegation:

“That the said defendant Nooner has, or claims to have, some interest in or lien upon said premises as described in said mortgage deed, but plaintiff is ignorant of the nature and extent thereof, and does not know whether the said defendant Nooner has at this time any subsisting lien upon said premises, and he demands proof of the same.”

A decree having been rendered foreclosing all of Nooner's rights to the property, he appeared and moved to set it aside, which the District Court promptly did, on the ground that the petition did not state facts upon which any judgment could be rendered against him. On appeal to the Supreme Court Justice VALENTINE used this language, which seems unanswerable:

“But passing over all these preliminary questions, we think the decision of the court below upon the main question, and upon the merits of the case, was correct. We have already quoted all the allegations of the petition that are supposed to state any cause of action against Nooner, and we do not think they state any such cause of action. What did Nooner admit by his default, by not answering to said petition? He merely admitted the truth of the allegation therein contained—nothing more, and nothing less. He admitted that he, ‘Nooner, has or claims to have some interest in or lien upon said premises as described in said mortgage deed’; that ‘plaintiff is ignorant of the nature and extent thereof, and does not know whether Nooner has at this time any subsisting lien upon said premises, and he [plaintiff] demands proof of the same.’ These

allegations are certainly not sufficient to sustain or uphold any judgment. The usual allegations in cases of this kind are substantially as follows: 'That the defendant G. H. has or claims some interest in or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage.' This form is taken from 2 Estee's Pleadings and Forms, 265, No. 450. See, also, Miller's Pl. & Pr. 610, No. 208; 5 Wait's Pr. 199; 1 Nash, Pl. & Pr. (4 ed.), 737, No. 5; 2 Van Santvoord's Pl. (2 ed.), No. 55; 2 Monell's Pr. 390, No. 147; Curtis Eq. Prac. 59 to 62, Nos. 18, 19. This form of pleading, or of allegation, in this particular class of cases (as above quoted from 2 Estee's Pl. & Forms), has been held to be sufficient (*Drury v. Clark*, 16 How. Pr. 424; *Frost v. Koon*, 30 N. Y. 428, 448), and we think it is sufficient. But the form adopted by the plaintiff below we think has never been held to be sufficient by any court, and we do not think that it is sufficient. And we do not think that such a form ever was sufficient in any case, either in law or equity. Every word of the plaintiff's petition may have been true, and yet Nooner may have been the absolute owner of the property in controversy, holding the same free and clear from all encumbrances. There is no allegation in the petition that Fletcher, the mortgagor, ever owned or had any interest in the property. And Nooner claims that he himself is the owner thereof. There should have been some allegation in the petition showing that Nooner's claim to the property was junior, or inferior, to the mortgage lien of the plaintiff. And it will be noticed that the said judgment against Nooner was not a judgment barring only such rights and interests of Nooner as were subsequent to the mortgage lien, but it was a judgment that barred all of Nooner's rights and interests in and to the property."

This excerpt states so clearly the law as we view it that further comment is unnecessary.

3. It is argued upon the strength of the opinion in *East Side Mill & Lumber Co. v. Wilcox*, 69 Or. 266

(138 Pac. 843), that the liens of plaintiff and other claimants were defective in not stating the nature of the materials furnished. That opinion was overruled in *Oregon Lumber Co. v. Nolan*, 75 Or. 69 (146 Pac. 474), and in *St. Johns Lumber Co. v. Pritz*, 75 Or. 286 (146 Pac. 483); and upon the authority of these two cases we hold the notices of lien sufficient.

This case will be reversed and the cause remanded, with directions to permit plaintiff and the cross-complainants to amend their pleadings, showing the relative priority of their liens with respect to appellant Title & Trust Company's claim, if they desire to do so, and to permit said appellant to plead to such allegations as may affect the priority of its lien, and, to take further testimony and render a decree upon the issues as there made up. As appellant Title & Trust Company was not diligent in protecting its interests in this matter, and has thereby caused unnecessary delay, it will receive no costs on this appeal.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE BENSON concur.

On motion to dismiss argued in chambers before MR. JUSTICE HARRIS April 6, 1915. Motion denied with permission to renew at final hearing April 13, 1915. Dismissed as per stipulation May 11, 1915.

BIRKEMEIER v. MILWAUKIE.

(147 Pac. 545.)

Appeal and Error—Appealable Orders—Overruling Demurrer.

1. In a suit to restrain a town from constructing a waterworks system, in which the complaint alleged that the town had not complied with the requirements of the charter that it should first attempt to acquire the existing private systems by arbitration, and the answer alleged that the town had complied with such requirements, an order overruling a demurrer to the answer left the issue of fact undisposed of, and was not final, and not appealable under

Section 548, L. O. L., providing that orders which affect a substantial right, and, in effect, determine the action, shall be, for the purpose of review, deemed judgments or decrees.

Appeal and Error—Dismissal of Appeal—Dissolution of Injunction.

2. Where complainant appealed from an order overruling a demurrer to the answer and dissolving a temporary injunction, and the only relief asked was an injunction to restrain a town from constructing a waterworks system in alleged violation of its charter provisions, so that, if the temporary injunction was dissolved, the suit would be practically terminated, the appeal from the order would not be dismissed on defendant's motion before the final hearing.

From Clackamas: JAMES U. CAMPBELL, Judge.

In Chambers before MR. JUSTICE HARRIS.

This is a suit by Fred W. Birkemeier on behalf of himself and others similarly situated, against the town of Milwaukie, a municipal corporation, G. C. Pelton, as mayor, Charles H. Counsell, C. C. Peary, B. G. Skulason and W. H. Grasle, as councilmen, D. P. Mathews, as recorder, and A. L. Bolstad, as treasurer of the town of Milwaukie, a municipal corporation, and their successors in office.

The defendants interposed a motion to dismiss the appeal, and a brief reference to the state of the record will lead to an understanding of the questions involved.

The plaintiff on December 28, 1914, filed a complaint which, in substance, alleged that Milwaukie was a municipal corporation, and the other defendants officers thereof; that the plaintiff is a taxpayer; that the Milwaukie Water Company, by virtue of a franchise from the defendant town, maintains a system of waterworks in that part of the town west of the O. & C. railroad track; that the Minthorne Springs Water Company is the holder of a franchise from the town, and maintains a system of waterworks in that part of the town east of the railroad track; that the council, without authority, passed a resolution authorizing the town to enter into a contract with the City of

Portland for supplying Milwaukie with water from Bull Run River; that on December 14, 1914, pursuant to the resolution mentioned, the mayor and recorder signed a contract with the City of Portland whereby the latter agrees to furnish water for two years in consideration of certain stipulated payments, the contract further providing that the City of Portland shall lay a water-main to a certain point at which the town of Milwaukie shall receive the water through a main laid by the latter; that the council claims to derive authority for the resolution from a certain amendment to the charter which was passed at a city election held March 18, 1913; that the amendment authorizes the town to acquire by arbitration or condemnation waterworks and water sources, or to construct, purchase, keep, conduct, operate and maintain waterworks in Milwaukie, to purchase and acquire Minthorne Springs, and to issue and dispose of bonds therefor; that the town issued and sold bonds to the amount of \$20,000, which sum is in the hands of the town officers, and is about to be expended for the purpose and in the manner hereafter stated; that the making of the contract with the City of Portland was in violation of the charter amendment which provides for the purchase of all or any of the privately owned water systems for such price as may be fixed by arbitration, but, if a remonstrance signed by 100 legal voters shall be presented to the council, further steps for such sale are prevented, and the council shall bring condemnation proceedings for the acquirement of the water systems, or shall construct an independent water system for the town; that the charter required the council, within ten days from the adoption of the charter amendment, to commence proceedings to

acquire the privately owned water systems by arbitration or condemnation, but the council neglected so to do; that the council has authority to construct an independent system only in the event a remonstrance signed by 100 voters against the arbitration proceedings is filed; that there were no arbitration proceedings as required by the charter; that no remonstrance signed by 100 voters was filed, and no condemnation proceedings were instituted; that the town is only authorized to construct a water system which is supplied from springs, wells, or streams on land owned or leased by the town and which will be permanent; that the contract with the City of Portland does not provide for a permanent system, and the money expended for laying pipes will be wasted, because it will be necessary to construct a new system upon the termination of the contract; that at an election held August 2, 1912, the voters rejected a proposed charter amendment to empower the making of a contract with Portland, whereby that city was to furnish water, and a majority of the voters are opposed to the contract which was signed; that, according to the present city charter and ordinances now in force, there will be held and conducted on December 28, 1914, a meeting of the council, at which the council will receive bids and award contracts for the construction of two miles of 8-inch steel pipe to the point specified in the contract, and will award contracts for the digging, opening and excavating of trenches for laying said two miles of pipe-line and for a distributing system, and for the purchase of all necessary materials; that the awarding of any contracts is beyond the power granted by the charter amendment adopted March 18, 1913. Wherefore plaintiff prays for a decree restraining the defendant from acting under the resolution, carrying out

the contract with the City of Portland, constructing any independent water system until the rights and obligations of the town to acquire the properties of the two present water companies have been settled, awarding any contracts for constructing any part of the proposed water system, and for a decree granting such other relief as may be equitable.

The defendants, on January 8, 1915, filed an answer which denies that the Milwaukie Water Company held a franchise from the defendant town, or that the resolution was unlawfully passed, or that the contract contravened the charter, or that the council was required to commence arbitration or condemnation proceedings within ten days from the adoption of the charter amendment, or that defendants failed to commence such proceedings; denies that no arbitration has been had or that no remonstrance was filed, or that the town is empowered to construct only such system as is supplied from springs, wells or streams on land owned or leased by the town, or that the system contemplated by the contract is not authorized by the charter, or that upon the termination of the contract the system of pipes will be useless, or the money paid therefor wasted; denies that the contract does not reflect the wishes of a majority of the voters; and admits that the town would receive bids and award contracts.

For a separate defense the defendants allege that, pursuant to the charter, bonds to the amount of \$20,000 were sold; that within ten days from the passage of the charter, and in full compliance therewith, arbitration proceedings were commenced for the acquirement of the privately owned water system; that the Milwaukie Water Company refused to accept the price fixed for its system; that within the time re-

quired by the charter a remonstrance, with more than 100 signers, was filed against the purchase of the system owned by the Minthorne Springs Water Company; that thereafter the council, in obedience to the charter, took steps looking toward the construction of an independent system, and caused plans and specifications to be made for such system; that, as stated in the complaint, the resolution was adopted, and the contract made; that the council did accept a bid for the construction of a waterworks system, subject, however, to the decision of the court in this suit, and, if this suit is dismissed, the town will proceed to carry out the contract with the City of Portland, and install a waterworks system; that there is no available good water supply in the town; and that the water proposed to be furnished under the terms of the contract is of a splendid quality.

The plaintiff demurred "to defendants' answer on file herein, on the ground that it fails to state facts sufficient to constitute a valid defense." Thereafter the court made the following order:

"This cause coming on for hearing upon plaintiff's demurrer to defendants' answer herein, and the court being fully advised in the premises, it is hereby ordered that said demurrer be, and the same is hereby overruled, and that the injunction heretofore issued be, and the same is hereby, dissolved, and plaintiff thereupon in open court gave notice of appeal to the Supreme Court."

MOTION DENIED.

Messrs. Skulason & Clark on brief, with an oral argument by *Mr. A. E. Clark*, for the motion.

Messrs. U'Ren & Hesse on brief, with an oral argument by *Mr. W. S. U'Ren, contra*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The defendants take the position that, on the record as already stated, the order is not appealable within the meaning of Section 548, L. O. L. The plaintiff contends that the order is appealable for the reason that the demurrer was not only overruled, but the preliminary injunction or restraining order previously issued was dissolved; that the ultimate relief asked for was an injunction, and when the court dissolved the temporary injunction it was an order affecting a substantial right, and which, in effect, determines the action or suit so as to prevent a judgment or decree therein. It will be assumed that the trial judge was of opinion that the plaintiff could not make any valid objection to the kind of water system proposed to be constructed, else he would have sustained the demurrer.

The plaintiff alleges that the defendants did not comply with the charter by first attempting to acquire the existing waterworks system by arbitration; and defendants aver that they did observe the directions of the charter in that particular. The right of plaintiff to the relief sought, among other things, depends upon the truth of the allegation that the charter was not followed, while the right of defendants to proceed may depend upon whether the charter has been obeyed. There is, then, an issue made by the pleadings and undetermined by the court. The ruling on the demurrer only determines whether the answer is good if true. The plaintiff in his complaint tells his version, while the defendants in their answer give an opposite account of the transaction. It is clear, then, that the ruling on the demurrer did not have the effect

of deciding the suit. If the only question to be considered was whether the ruling on the demurrer could be appealed from before final decree, the conclusion would be clear that the order was not appealable. An appeal from a final decree would, of course, permit the review of the order overruling the demurrer.

This court has said:

“An order or decree is final for the purposes of an appeal when it determines the rights of the parties, and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect”: *State v. Security Savings Co.*, 28 Or. 410, 417 (43 Pac. 162).

The following cases are to the same effect: *Sears v. Dunbar*, 50 Or. 41 (91 Pac. 145); *Giant Powder Co. v. Oregon Western Ry. Co.*, 54 Or. 326 (101 Pac. 209, 103 Pac. 501); *Basche v. Pringle*, 21 Or. 24 (26 Pac. 863); *Fowle v. House*, 26 Or. 588 (39 Pac. 5); *Helm v. Gilroy*, 20 Or. 520 (26 Pac. 851); *Marquam v. Ross*, 47 Or. 381 (78 Pac. 698, 83 Pac. 852, 86 Pac. 1); *Rockwood v. Grout*, 55 Or. 389 (106 Pac. 789); *Clay v. Clay*, 56 Or. 539 (108 Pac. 119, 109 Pac. 129); *Lecher v. City of St. Johns*, 74 Or. 558 (146 Pac. 87).

2. There is, however, an additional feature. The preliminary injunction was dissolved. Ordinarily, an order granting or denying a preliminary injunction is not appealable (*Helm v. Gilroy*, 20 Or. 520 (26 Pac. 851); *Basche v. Pringle*, 21 Or. 24 (26 Pac. 863)); but the plaintiff contends that he asks for nothing in his complaint except injunctive relief; that the dissolution of the temporary injunction will permit the defendants at once to proceed with the work attempted to be enjoined; that there is now no obstacle to prevent the defendants from doing the very thing that the suit was designed to prevent; that, if the work mentioned is

completed before a decree in the Circuit Court, an appeal would be vain and futile; and that therefore the order affected a substantial right, and, in effect, determined the suit.

Because of the importance of the question involved in the last-mentioned phase of the case, the motion to dismiss is denied; but, for the purpose of enabling a complete presentation of the subject, the defendants are granted permission to renew their motion at the final hearing.

MOTION TO DISMISS DENIED.

Appeal dismissed as per stipulation May 11, 1915.

Motion to dismiss appeal submitted on briefs December 8, denied December 29, 1914. Dismissed as per stipulation May 11, 1915.

PROCTOR v. JEFFERY.

(144 Pac. 1192.)

Appeal and Error—Proceedings—Lack of Jurisdiction—Dismissal.

1. Where lack of jurisdiction of an appeal is disclosed by the appellant's failure to give a proper notice of the appeal within the time limited to file a proper undertaking or to send up a transcript, the appeal must be dismissed.

Appeal and Error—Proceedings—Assignment of Error—Failure to Include—Effect.

2. Where an abstract on appeal failed to contain assignment of errors, such assignment not being essential to transfer of the cause, its omission was not ground for dismissal, and appellant would be permitted to include it by amendment.

Appeal and Error—Scope of Review—Pleadings.

3. Where an appeal is taken by defendants, they may contest the sufficiency of the complaint for want of facts without filing a bill of exceptions.

From Clatsop: JAMES A. EAKIN, Judge.

This is an action by Mrs. J. H. Proctor against Robert R. Jeffery, as executor, and Nellie Mason, as executrix of the will of R. L. Jeffery, deceased. Judg-

ment for plaintiff, and defendants appeal. On motion to dismiss appeal. MOTION DENIED.

Mr. George C. Fulton, for the motion.

Mr. Clarence J. Curtis, *contra*.

In Banc. MR. JUSTICE MOORE delivered the opinion of the court.

This is a motion to dismiss an appeal on the grounds that the abstract does not contain any assignments of error, and that the bill of exceptions is insufficient to authorize an investigation of any questions to be re-examined. The appellants' counsel, denying that the bill of exceptions is inadequate, moves for leave to file an amended abstract setting forth assignments of error.

1, 2. When by the failure of a party to give within the limited time a proper notice of appeal, to file an undertaking therefor, or to send up a transcript thereon, a lack of jurisdiction is disclosed, the appeal must necessarily be dismissed. An assignment of errors in an abstract though convenient to a speedy examination of the questions undertaken to be reviewed, is not now made by statute essential to a transfer of a cause to the Supreme Court. It has been the practice, when an assignment of errors was inadvertently omitted, to permit, on proper showing, a typewritten statement of the errors relied upon to be inserted in the abstract after it was filed.

3. In the case at bar, the appellants being the defendants can, upon the filing of a mere transcript, challenge the sufficiency of the complaint to state facts adequate to constitute a cause of action, without filing a bill of exceptions.

The motion to dismiss the appeal should be denied and leave granted to file an amended abstract which has been tendered, and it is so ordered.

MOTION DENIED.

Dismissed as per stipulation May 11, 1915.

Argued April 12, reversed April 20, rehearing denied May 18, 1915.

HARTMAN v. NATIONAL COUNCIL.*

(147 Pac. 931.)

Insurance—Fraternal Benefit Insurance—By-laws—Validity.

1. A by-law of a fraternal benefit insurance society, providing that the local officers shall be considered as agents of the members in accepting and transmitting payments for insurance, is valid.

[As to law of beneficial associations, see note in 19 Am. St. Rep. 781. As to features of law especially applicable to mutual or membership life or accident insurance, see note in 52 Am. St. Rep. 543.]

Insurance—Fraternal Benefit Insurance—By-laws—Validity.

2. A by-law of a fraternal benefit society, providing that a member, suspended for nonpayment of dues, shall be reinstated only when in good health, and that the payment of arrearages shall be considered a warranty of good health, is valid, and a member should be held to a strict compliance therewith.

Principal and Agent—Liability to Third Persons—Limitation of Agent's Authority.

3. One who deals with an agent, knowing the limitations on his authority, cannot hold the principal for representations and acts of the agent in excess of his authority.

[As to general rules respecting authority of agent, see note in 16 Am. St. Rep. 493. As to effect of limitation on agent's authority to waive conditions in insurance policy, see note in Ann. Cas. 1914a, 590. As to liability of principal for unauthorized acts of agent, see notes in 22 Am. St. Rep. 189; 88 Am. St. Rep. 779. As to personal liability of agent on contract executed without authority, see note in 50 Am. Dec. 793.]

Insurance—Fraternal Benefit Insurance—By-laws—Waiver.

4. Where the by-laws of a fraternal benefit society provided that a suspended member could not be reinstated, except while in good

*The cases passing upon waiver by officer of subordinate lodge of forfeiture for nonpayment of assessment are reviewed in the notes in 4 L. R. A. (N. S.) 421 and 38 L. R. A. (N. S.) 571. REPORTER.

health, and that the local officers had no authority to waive the provisions of the by-laws, the acceptance by the local officers of a payment of arrearages of a suspended member, with knowledge that the member was at that time sick, does not waive the provisions of the by-laws and reinstate the member.

[As to waiver of forfeiture for nonpayment of assessments or dues by acceptance of arrearages or similar acts, see note in Ann. Cas. 1914C, 437.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by May E. A. Hartman, now May E. A. Osmund, and George H. G. Hartman, who were children and beneficiaries of Johanna H. Hartman, to recover upon a certificate of membership issued by the defendant corporation insuring her life for their benefit in the sum of \$1,000. They allege full performance by the assured of all things required of her by the contract, demand of the amount after the death of their mother, and the defendant's refusal to pay. The certificate is made part of the complaint, and its execution and delivery are admitted. The answer interposes two defenses. The first is in substance that the action was not brought within one year after the rejection of the claim, such shortening of the statute of limitations being one of the terms of the agreement. The second is to the effect that the insured failed to pay her dues to the defendant, whereby she was automatically suspended, during which suspension she became sick of typhoid fever, complicated with uremia, of which she subsequently died; that by the laws of the defendant, made part of the contract by the parties, her sickness made her ineligible for reinstatement; that although during her illness, her arrearages were paid to the defendant, yet it was without the knowledge of the latter that she was sick, and, on discovery of the same for the first time after her death, the

money so paid was tendered to the plaintiffs and by them refused. After many denials for want of information and belief, the reply in substance alleges a waiver by the defendant of the condition of the policy mentioned, basing it upon certain alleged conversations which one of the plaintiffs had with the financier of the local council. The result of a jury trial was a verdict for the plaintiffs, and from the ensuing judgment the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Christopherson & Matthews*, with an oral argument by *Mr. Q. L. Matthews*.

For respondents there was a brief over the names of *Mr. John Ditchburn* and *Messrs. Hansen & McGinniss*, with oral arguments by *Mr. A. Hansen* and *Mr. Ditchburn*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The contention here is waged around the representations imputed to the financier of the local council, and the motion for a directed verdict at the close of all the testimony. Many other errors were assigned, but all depend upon the rulings of the court upon these two questions.

The evidence shows that the defendant is a mutual fraternal organization, with ritual, secret work and social features, combined with the element of insurance of its members. It consists of a national body, the defendant, of district conventions, and of local organizations. The local concerns elect their own officers by vote of their members. They also elect repre-

sentatives to district conventions, and these in turn elect delegates to the national council, which enacts the laws governing the institution and its membership. Certain conditions of the certificate upon which the action is founded are here set forth:

"3. This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in said member's application to become a member of this order and in said member's medical examination, and also in consideration of the payments made when initiated as a member, and said member's agreement to pay all assessments and dues to become due during the time said member shall remain a member of this order. * *

"6. This certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the laws of the order, or for any other cause or causes of forfeiture which may be hereafter prescribed by this order by the amendment of said laws."

The laws of the order, pleaded and read in evidence, and against which there is no contradictory evidence, contained these provisions:

"Suspensions.

"Sec. 112. Members Suspended by Their Own Act. —The financier of each subordinate council shall keep a book wherein all regular and special assessments and dues received from each member holding a valid certificate shall be credited. Such entries shall be made showing the date when actually received by the financier. All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month shall, by the fact of such nonpayment, stand suspended without notice, and no act on the part of the council or any officer thereof, or of the national council, shall be required as essential to such suspension, and all rights under said certificate shall

be forfeited. No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the order, with reference to reinstatement. * *

"Reinstatements.

"Sec. 113. How Reinstated.—Each member who has been suspended for nonpayment of dues or nonpayment of an assessment or assessments shall only be reinstated in accordance with the constitution and laws of the order.

"Sec. 114. How a Member may be Reinstated within Sixty Days.—Any beneficiary member suspended by reason of nonpayment of an assessment or assessments, or dues, may within sixty days from the date of such suspension be reinstated upon the following conditions and none other, viz.: If not engaged in any of the prohibited occupations mentioned in Section 107 of these laws, he may be reinstated by payment, within sixty days from date of suspension, of all arrearages of every kind, including assessments and dues, for which he would have been liable had he remained in good standing: Provided, however, that he be in good health at the time of making payment to the financier with a view of reinstatement. The payment of any such assessments and dues for reinstatement shall be a warranty by such member that he is in good health at the time of such payment. Provided, further, that the receipt and retention of such assessments and dues, in case the suspended member is not in good health, or is engaged in a prohibited occupation, shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate. * *

"Sec. 117. Suspended or Expelled Member Forfeits All Rights.—Any member suspended or expelled from the order for any cause whatever forfeits all claims to the beneficiary fund, reserve fund, general fund and all other funds of the order during said suspension or expulsion. * *

"Sec. 120. National Council not Bound by an Illegal Receipt.—The national council shall not be bound

by the acceptance of arrears of assessments and dues from suspended members who are not entitled to reinstatement in accordance with the laws of the order. The receiving of such arrears and receipting therefor by an officer of a subordinate council, the national secretary, or by any other person, or the payment by or on behalf of any suspended member, of arrears of assessments and dues with a view to reinstatement except as provided for in the laws of the order, shall not be binding on the national council. The failure of any financier to report to the national council as suspended any suspended member of his council shall not operate in any case as a waiver of the forfeiture occurring on account of the suspension. The retention by the financier, or by the order, of assessments and dues paid by members or for them with a view to reinstatement other than as provided in the laws of the order, either before or after death, shall not constitute a waiver of any provisions of these laws until a demand has been duly made for their return by such member, or his beneficiary, or legal representative.

"Sec. 120. (a) National Council not Bound by Knowledge of or Notice of Officers or Members of Local Councils.—No officer of this society nor any local council officer, or member thereof, is authorized or permitted to waive any provisions of the by-laws of this society, which relate to the contract between the member and the society whether the same be now in force or hereafter enacted. Neither shall any knowledge or information obtained by or notice to any subordinate council or officer or member thereof, or by or to any other person, be held or construed to be the knowledge or notice to the national council or the officers thereof, until after said information or notice be given in writing to the national secretary of the order."

It appears without dispute that the decedent did not pay her assessments for the months of May and June, 1912, during those months, and that they were not paid for her until July 12th of that year, at which last date

she had been sick in the hospital for several days, afflicted as before stated. The payments were made by her daughter, one of the plaintiffs, who testifies that she told the local financier that her mother, the insured, was sick, and that he, having the knowledge thus imparted, accepted the arrearages which she paid. There is no testimony whatever tending to show that information of the sickness of the insured was in any way communicated to the principal officers of the defendant. She never recovered from her illness, but died at the hospital August 2, 1912. Proofs of her death were forwarded to the defendant at Topeka, Kansas, and seasonably thereafter its executive committee, in whom the laws of the order vested the authority during the recess of the grand council to approve or reject such claims, addressed to the plaintiffs this letter, under date of October 11, 1912:

“The claim made on account of the death of your mother was considered by our executive committee at its session yesterday and unanimously rejected. The proof shows that your mother did not pay May or June, 1912, assessments and dues within the month, but that on July 12th there was paid for her the three months, May, June, and July, at which time she was ill with typhoid fever and uremia, and under our law could not reinstate, and the payment to the financier, she not being in good health, did not reinstate her. This information did not come to our attention until the proof was in. Under the circumstances, she was not a member of the society at the time of her death, and therefore there was no liability on account of the certificate. The assessments paid since she was not entitled to reinstate will be handed you by our deputy, Brother W. E. Cummings, who is acting in this matter at our instance and request.”

Signed by the national secretary.

The evidence also shows that the amount mentioned was tendered to each of the plaintiffs, and was by both

of them refused, prior to the commencement of the action. Another section of the laws of the order reads thus:

“Sec. 169. Council is Member’s Agent.—A subordinate council and its officers are the agents of its members in making application for membership, admission of members, the reinstatement of members, the collection and transmission of all assessments to the national council, the serving of all notices upon its members whether such notices are required by the laws of the order, or whether they have been adopted by custom of the subordinate council or its officers. The national council shall not be liable for any negligence in any of these matters, nor be bound by any irregularity, neglect or illegal action by a subordinate council or by any of its officers.”

1. The facts indicated by the excerpts from the testimony here given are undisputed. The question is: What is the legal conclusion to be drawn from those uncontroverted facts? Some courts have gone so far as to say that, notwithstanding the laws of the order and the stipulations of the parties to be bound by them, yet the local officers are the agents of the chief organization of the order, and not of the members or the local council. Such is the rule laid down in such cases as *Dromgold v. Royal Neighbors*, 261 Ill. 60 (103 N. E. 584), and *Dougherty v. Foresters*, 125 Minn. 142 (145 N. W. 813), and other precedents which might be noticed. The great weight of authority, however, is to the effect that it is competent for parties to enter into a contract such as is here set out and embodied in the certificate and laws of the order. There is nothing contrary to public policy or in violation of any public law in making such a stipulation. There is good reason for making the officer of the local council the agent of the member, for that official

is elected by the vote of the members, and, being so chosen, it is competent for the parties to stipulate against a possible favoritism to be shown by the officer to the person who elects him as against the general membership of the order.

2. It is also sound policy to hold a member to strict compliance with the laws of the order respecting the payment of dues and the regulation requiring the applicant for reinstatement to be at the time in good health. The insurance in these fraternal institutions is temporary in its character, and its stability depends upon exact observance of the rules for payment. The contract is not purely between the individual member and the corporate organization. It is in spirit and in truth a covenant, not only with the central body, but with every other individual participating in the benefits afforded by the project, for the concern is mutual, and the co-operation of every member is essential to its success as an insurance society. The assured cannot take chances and make default during good health, and afterward, when death threatens, come forward with the arrearages and claim the insurance. None the less, under such circumstances, can the beneficiary at the eleventh hour take up a project which the assured has abandoned and expect to profit thereby. The situation is analogous to the one condemned by Mr. Justice EAKIN in *Matthews v. Travelers' Ins. Co.*, 73 Or. 278 (144 Pac. 85), where the plaintiff, holding an accident insurance policy, allowed the same to lapse, and, after having lost an eye, sent his overdue premium to the company without informing it of his misfortune. A recovery on the policy was denied. In *Lathrop v. Modern Woodmen of America*, 56 Or. 440 (106 Pac. 328, 109 Pac. 81), it was held by this court that:

The "by-laws of a beneficial association, expressly providing that no local camp or any officer thereof shall waive any provisions of such by-laws, are binding, and render an attempted waiver illegal"; and "where the by-laws of a beneficial association provided that the certificate should not be effective until delivered to the applicant while in good health, and his adoption into the order, and his payment of dues and assessments, the failure of an applicant to pay, while in good health and before the accident, the dues and assessments, defeated a recovery on the certificate, and a payment after the accident to the local clerk was not binding on the association, in the absence of a showing that it had knowledge thereof and acquiesced therein."

It may be noted that at a subsequent trial of this case a recovery was had, which was sustained in the opinion of Mr. Justice McBRIDE, reported in 63 Or. 193 (126 Pac. 1002), but upon the fact, developed in the second trial, that the member had never been in default, and the doctrine that, the right to the policy having been established, placing it in the hands of anyone for delivery, the actual passing from hand to hand only remaining to be accomplished, was tantamount to delivery as against the defendant. The principles announced in the first opinion were not disturbed by the later decision.

Again, in *Squires v. Modern Brotherhood*, 68 Or. 336 (135 Pac. 774), the court, speaking by Mr. Justice RAMSEY said:

"But, if the defendant did not know or have notice that the defendant's health was not good when said reinstatements occurred, and reinstated her with the understanding that her health was good, such reinstatements were invalid, and not binding on the defendant, if her health was in fact not good at the time of such reinstatements."

3. It is elementary that, if one dealing with an agent has knowledge of limitations on his authority, the representations or acts of the latter contrary to his instructions will not be binding upon the principal, unless with knowledge of all the facts the principal either waives the disobedience of the agent or adopts his acts. In the exhaustive opinion of Mr. Justice SHIRAS of the United States Supreme Court in *North-ern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308 (46 L. Ed. 213, 22 Sup. Ct. Rep. 133), the subject of agency for an insurance company was carefully considered. The claim there was that the condition against other insurance had been violated by the insured. It was shown that knowledge of the outstanding insurance was brought home to the agent of the company; but was part of the policy in question that:

“No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.”

The opinion goes on to state that:

“The plaintiff’s case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained

in the policy. In other words, the contention is that an agent, with no authority to dispense with or alter the conditions of the policy, could confer such power upon himself by disregarding the limitations expressed in the contract; those limitations being according to all the authorities presumably known to be insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. * * So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium. The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense, and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court."

It was lawfully competent for the defendant to forbid the local officer to waive the conditions mentioned, for Section 20 of the act of the legislative assembly of date February 23, 1911 (Laws 1911, p. 363), "for the regulation and control of fraternal benefit societies," reads thus:

"Waiver of the Provisions of the Laws.—The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

4. In this case there is no evidence, as stated, to show that the local officer, who accepted the arrearages, or anyone, ever communicated to the principal officers of the defendant anything concerning the sickness of the assured. On the contrary, the only evidence on that subject is to the effect that the first knowledge they had of it was derived from the proofs of death, based upon which they immediately rejected the claim and offered to repay the arrearages which had been advanced. Moreover, controlled as she was by the terms of her certificate and the laws of the order, which are made a part thereof, and to which she was subject, having had her part in the enactment of the same through her representatives, the assured was bound to take notice of the limitations upon the authority of the local officer, although for some purposes he might be held to be the agent of the defendant. The beneficiaries can take nothing by reason of the agent's violation of his instructions. The following precedents are illustrative of the conclusion here set down: *Woodmen v. Jackson*, 80 Ark. 419 (97 S. W. 673); *Supreme Commandery v. Bernard*, 26 App. D. C. 169 (6 Ann. Cas. 694); *Sheridan v. Modern Woodmen of America*, 44 Wash. 230 (87 Pac. 127, 120 Am. St. Rep. 987, 7 L. R. A. (N. S.) 973); *Hay v. People's Mut. Ben. Assn.*, 143 N. C. 256 (55 S. E. 623); *Gifford v. Workman's Benefit Assn.*, 105 Me. 17 (72 Atl. 680, 17 Ann. Cas. 1173); *Showalter v. Modern Woodmen of America*, 156 Mich. 390 (120 N. W. 994); *Grand Lodge A. O. U. W. v. Taylor*, 44 Colo. 373 (99 Pac. 570); *Bixler v. Modern Woodmen of America*, 112 Va. 678 (72 S. E. 704, 38 L. R. A. (N. S.) 571); *Royal Highlanders v. Scovill*, 66 Neb. 213 (92 N. W. 206, 4 L. R. A. (N. S.) 421); *Modern Woodmen v. Tevis*, 54 C. C. A. 293 (117 Fed. 369); *Clair v. Supreme Coun-*

cil, 172 Mo. App. 709 (155 S. W. 892); *Jones v. Modern Brotherhood*, 153 Wis. 223 (140 N. W. 1059); *Knode v. Modern Woodmen of America*, 171 Mo. App. 377 (157 S. W. 818); *Commercial Travelers v. Young*, 212 Fed. 132 (128 C. C. A. 648).

The only conclusion to be drawn from the uncontradicted testimony was that at the time the arrearages were paid the assured was not eligible for reinstatement; that the payments made for her amounted under the laws of the order to a warranty that she was then in good health; that, although the local official may have known that this was not true, yet there is nothing to show that the controlling officers of the defendant knew anything about the state of her health; and that promptly upon the same being brought to their attention they repudiated her claim, as of right they could, and offered to return to her beneficiaries the amount paid for her. The deduction which the law makes in such a case is favorable to the defendant, and a verdict should have been directed accordingly.

It is not necessary to consider the other defense depending upon the agreed limitation of the time within which an action should be instituted.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to enter judgment for the defendant.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Motion to dismiss denied October 6, 1914, argued on the merits March 29, modified and remanded April 27, 1915.

STACY v. McNICHOLAS.

(144 Pac. 96; 148 Pac. 67.)

Appeal and Error—Proceedings to Transfer Cause—Time for Proceedings.

1. In a receivership proceeding, an appeal taken June 4th, from a decree entered on April 6th, in favor of petitioning holders of receiver's certificates, authorizing the receiver to apply to the United States District Court, in which bankruptcy proceedings were pending, for leave to sell property, was in time, under Laws of 1913, pages 617, 618, authorizing an appeal within 60 days from the entry of the judgment, decree, or order appealed.

Appeal and Error—Decisions Reviewable—Default Decree.

2. In a suit for the appointment of a receiver, a decree upon the petition of holders of receiver's certificates, which petition was contested by the trustee and bankruptcy of the former owner, is not a decree by default for the purposes of review.

Appeal and Error—Motion to Dismiss—Review—Scope and Extent.

3. Under Section 558, L. O. L., providing that the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from, the question whether orders, made more than 60 days prior to the notice of appeal from the decree, to which error is assigned, can be considered will not be determined on a motion to dismiss the appeal.

ON THE MERITS.

Corporations—Receivers—Appointment—Jurisdiction.

4. Generally, a receiver of an insolvent corporation should not be appointed without notice to the parties affected and before they have an opportunity to be heard, though the statute does not require notice, for the rules of equity which govern, when not inconsistent with the statute, require notice.

[As to when it is proper to appoint a receiver, see notes in 64 Am. Dec. 482; 72 Am. St. Rep. 29. As to appointment before institution of suit, see note in Ann. Cas. 1912B, 236.]

Corporations—Receivers—Ex Parte Appointment—Acquiescence.

5. A defendant may waive an objection to an ex parte appointment of a receiver by acquiescence by failing to interpose a timely objection or by participating in the proceedings after the appointment.

[As to necessity of giving notice of application for appointment of receiver, see note in Ann. Cas. 1915C, 897.]

Corporations—Receivers—Ex Parte Appointment.

6. A receiver of a corporation was appointed without notice. The holder of the property as trustee appeared and answered in the suit

in which the receiver was appointed and asserted that a mortgage was a first lien on the property. He participated in other proceedings. He objected to the receiver operating the business of the corporation and to the making of the expenses of operating a lien prior to the mortgage, but he did not object to the appointment of the receiver. *Held*, that since under Section 392, L. O. L., the trustee could, without joining his beneficiary, maintain a suit, the parties interested acquiesced in the appointment of the receiver without notice.

Receivers—Expenses—Liability.

7. Property placed in the hands of a receiver by order of court of equity is chargeable with the necessary expenses incurred in taking care of and saving the property.

Receivers—Expenses—Liability.

8. Allowance to a receiver as compensation for his services is taxable as part of the costs and is entitled to priority of payment as a lien on the property.

Receivers—Expenses—Liability.

9. Expenses incurred by a receiver for labor and supplies necessary to care for and preserve the property are taxable as costs and are entitled to priority of payment as a first lien on the property as against a prior mortgage.

Receivers—Authority—Power of Court.

10. The court appointing a receiver of a private corporation may not authorize the receiver to continue the business, in the absence of consent of prior contract lien creditors.

Receivers—Expenses—Payment.

11. Expenses incurred by a receiver of mining property in operating the mines not necessary for the care and preservation of the property should be paid as far as possible from the income realized from the mines, and any balance of operating expenses remaining unsatisfied must share with other like claims.

Receivers—Appointment—Receivers' Certificates.

12. Where a receiver of a corporation was appointed, and necessary expenses for the preservation of the property authorized before a mortgage foreclosure suit, the necessary expenses evidenced by receiver's certificates issued by the clerk under stipulation of the parties are entitled to priority over the mortgage.

[As to receiver's certificates, see notes in 128 Am. St. Rep. 102; Ann. Cas. 1913C, 39.]

Corporations—Receivers—Appointment—Jurisdiction of Court.

13. A court of equity has no inherent power to appoint a receiver of an insolvent corporation, and has no jurisdiction to appoint a receiver, except as ancillary to an actual pending suit against the corporation.

Bankruptcy—Administration of Estate—Receiver Appointed by State Court.

14. Where a receiver of a corporation appointed by a state court did not file his bond or oath, nor take possession of the property

until less than four months prior to bankruptcy of the corporation, the bankruptcy court must administer the affairs of the insolvent estate, and claims represented by certificates of a prior receiver may be presented and allowed in the bankruptcy proceedings.

From Josephine: FRANK M. CALKINS, Judge.

In Banc. Statement by MR. JUSTICE RAMSEY.

This suit appears to have been commenced in 1910 by James E. Stacey, Daniel Myers, David J. Nye, George T. Briggs and C. H. McKeown, against James H. McNicholas, Old Channel Hydraulic Mines Company, a corporation, Thomas W. Browning, Old Channel Mining Company, an Illinois corporation, and William Ulrich, trustee of the Old Channel Mining Company, bankrupt, for an accounting and to have a receiver appointed. The respondents move to dismiss the appeal.

MOTION DENIED.

Mr. O. H. Lawler, Mr. Alfred E. Reames, Mr. H. D. Norton, Mr. William C. Hale and Mr. O. S. Blanchard, for the motion.

Messrs. Colvig & Roberts, Messrs. Durham & Richard and Mr. Jacob E. Dittus, contra.

MR. JUSTICE RAMSEY delivered the opinion of the court.

On August 5, 1910, L. C. Hudson was appointed receiver of the mining property described in the complaint. On July 10, 1911, said receiver was discharged. On February 24, 1913, the court below appointed J. F. Reddy receiver of said property. It seems that some or all of the mining property described in the complaint belonged to the Old Channel Mining Company, an Illinois corporation, and that on August 18, 1913, the District Court of the United

States for the District of Oregon made and entered an order adjudging said corporation to be bankrupt, and William Ulrich, one of the appellants, was appointed by said United States District Court trustee in bankruptcy of said corporation, and he duly qualified as such trustee. Said trustee in bankruptcy claimed the right to the possession of said mining property as trustee of said corporation, under the bankruptcy laws of the United States. On September 18, 1913, he petitioned the court below for an order thereof authorizing and requiring J. F. Reddy, said receiver, to turn over to him said mining property as trustee in bankruptcy of said corporation. The court below refused to grant the prayer of his petition. In February, 1914, 31 holders of receiver's certificates issued in this cause applied to the court below for a decree for the sale of said mining property by J. F. Reddy, receiver of the property of said bankrupt corporation, it being claimed by said petitioners that J. F. Reddy was the receiver of said property. The appellant William Ulrich, as trustee in bankruptcy of said corporation, filed in said court written objections to the granting of the relief asked by said petitioners, in which he claimed, *inter alia*, that the order of the court below appointing J. F. Reddy receiver of said property was void, and that Reddy did not qualify as such receiver until after the petition to have said corporation adjudged a bankrupt was filed in the United States court. He claimed, also, that he was in possession of said property as trustee, and that he, as trustee, was duly authorized to sell said property, and that the United States District Court for the District of Oregon had issued an injunction restraining J. F. Reddy, as receiver of said property, from in any manner interfering with said property or with the control of said trustee over the

same. Said trustee prayed said court not to authorize J. F. Reddy, as receiver, to sell said property, etc. The application of the various interested parties for the relief referred to *supra*, and to which the appellant William Ulrich, as trustee of said bankrupt corporation, objected as stated above, came on for hearing in the court below on the 6th day of April, 1914, and on that day a decree was rendered by said court containing many provisions, and among them, a provision directing J. F. Reddy, as receiver, to apply to the United States District Court for an order dissolving all restraining orders issued by said United States court pertaining to said mining property, and ordering J. F. Reddy, as receiver, upon the dissolution of said restraining orders issued by the United States court, to proceed and advertise the property of the Old Channel Mining Company in Oregon for sale and to sell the same in the manner stated in said decree, etc. The appellant Ulrich, as trustee, appeared in said proceeding and opposed the granting to Reddy, receiver, the power to sell said property, claiming that Reddy was not legally receiver of said property, and that the appellant, as trustee in bankruptcy of said corporation, was in possession thereof and had the right to sell it, and was endeavoring to do so. The Old Channel Mining Company and William Ulrich, its trustee, appealed from the whole said decree.

1. The respondents moved to dismiss the appeal on the ground:

“That the record fails to show any appeal taken within the time limited by law from any appealable order, judgment, or decree made or entered in said court and cause.”

The notice of appeal states that the appellants appeal—

“from the decree of the Circuit Court of the State of Oregon, for the county of Josephine, and from the whole thereof, rendered and entered in the above-entitled suit on or about the 6th day of April, A. D. 1914, said decree being in favor of the petitioning holders of receiver’s certificates and J. F. Reddy and against William Ulrich, as trustee in bankruptcy of the Old Channel Mining Company.”

The notice of appeal properly describes the decree appealed from. The decree is dated April 6, 1914, and it is favorable to the holders of receiver’s certificates and J. F. Reddy and against William Ulrich, trustee in bankruptcy of the Old Channel Mining Company. The notice of appeal appears to have been served on the 3d and 4th days of June, 1914. The undertaking for the appeal was served and filed within the time allowed by law. Under the present statute (Laws 1913, pp. 617, 618), if the appeal is not taken in open court at the time of the rendition of the judgment or the decree or final order appealed from, it must be taken by serving and filing the notice of appeal within 60 days from the entry of the judgment, decree or order appealed from, and the undertaking for the appeal must be served and filed within 10 days from the giving or service of the notice of the appeal. We find that the appeal from said decree was taken within the time allowed by law therefor.

2. The decree appealed from was not rendered by default. It was based on a showing made shortly before its rendition. In this proceeding, Ulrich, trustee in bankruptcy, appeared, filed and presented objections to the application for a decree for the sale of said property then made, and his objections were overruled.

The decree appealed from appears to have been made upon the petition of 31 holders of receiver's certificates, asking for a decree for the sale of the property of the Old Channel Mining Company. The decree appealed from was based on this petition rather than upon the original complaint. We hold that the appellants had a right to appeal from said decree.

3. In the abstract the appellants set forth 19 alleged errors, for which they ask a reversal of the decree appealed from, and they refer to various orders made by the court below that they assert were erroneous. The respondents contend, by their motion to dismiss the appeal, that as to most, if not all, of these orders the time for appealing therefrom had expired prior to the date of the taking of this appeal. But this appeal is taken only from the decree rendered on April 6, 1914, and the notice of appeal does not refer to any other decree or order. Section 558, L. O. L., provides that, upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from. To what extent those orders can be reviewed on this appeal will be a proper question for consideration on the trial on the merits; but it is not proper to consider that question on a motion to dismiss the appeal. The decision of the court in granting the decree for the sale of the property of the Old Channel Mining Company can be reviewed on the appeal, because that is the chief thing incorporated into the decree appealed from, but what else may be reviewed at the trial on the merits it is not proper to determine on this motion. The fact that there is a question that can properly be reviewed at the hearing on the merits necessitates the denial of the motion to dismiss; the appellants having perfected their appeal in accordance with the statute. The mer-

its of the case cannot be considered or determined on a motion to dismiss the appeal.

3 Cyc., page 197, say:

"On a motion to dismiss [an appeal], the appellate court will not pass on the merits of the appeal. And in case that, in passing on a motion to dismiss, the court would be required to examine the entire record, the motion will not be considered until final submission on the merits."

In Elliott's App. Proc., Section 522, the author says:

"A motion to dismiss [an appeal] does not involve any questions concerning the merits of the controversy; it simply brings in question the effectiveness of the appeal. On such a motion the court will only inquire whether the appeal lies and whether it is properly taken and perfected."

3 Cyc. Pl. & Pr., page 347, says:

"The inquiry on a motion to dismiss [an appeal] is accordingly limited to ascertaining whether an appeal lies in a given case, and whether it has been regularly taken and perfected."

2 Hayne on New Trial and Appeal (Revised ed.), Section 272, says:

"Nor should an appeal be dismissed in advance of the hearing on the merits, upon the ground that the appellant is merely a formal party, and has no real interest in the controversy, or that the appeal was taken for delay, or that the matter has been decided on a previous appeal. These questions cannot be determined in advance of a hearing on the merits, and the court will never consider the merits on a mere motion to dismiss."

In *Corder v. Speake*, 37 Or. 105 (51 Pac. 647), the syllabus is in part:

"A motion to dismiss an appeal or to affirm a judgment proceeds on the theory that the appellate court is

without jurisdiction, or that the appellant has not complied with some rule of court, and unless one of these conditions is made to appear, the motion must be overruled. In passing on a motion to dismiss an appeal, the merits of the case will not be considered."

The respondents contend that most of the matters referred to in the appellants' assignment of errors cannot be reviewed on this appeal, because they transpired more than 60 days prior to the taking of the appeal. They can present their contentions on those points at the hearing on the merits, but not on this motion to dismiss. We conclude that the appellants had a right of appeal from the decree of April 6, 1914, and that they properly perfected their appeal.

The motion to dismiss the appeal is denied.

MOTION DENIED.

Modified April 27, 1915.

ON THE MERITS.

(148 Pac. 67.)

Department 2. Statement by MR. JUSTICE BEAN.

This is an appeal by the Old Channel Mining Company, an Illinois corporation, and William Ulrich, its trustee in bankruptcy, from a decree authorizing J. F. Reddy, the receiver, to sell certain property belonging to the above corporation and confirming as liens against such property certain receiver's certificates issued under a prior receivership.

The pleadings show that prior to August 10, 1909, the Old Channel Mining Company was the owner and in possession of certain placer mining ground and mining property situate in Josephine County, Oregon. This company on the above date entered into a con-

tract whereby it was to sell its property to James H. McNicholas for \$110,000, on terms of \$25,000 cash and \$85,000 represented by notes secured by mortgage on the property. In order to facilitate matters, the legal title of the property was placed in the name of Thomas W. Browning, who held the same as trustee for the corporation. The sale was consummated, and Browning executed a deed; McNicholas paying the agreed amount in cash and executing a mortgage on the property for the balance. McNicholas thereafter organized the Old Channel Hydraulic Mines Company, to which on May 2, 1910, he transferred the property purchased from Browning. This latter company assumed the payment of the mortgage given by McNicholas as part payment for the mine. The Old Channel Hydraulic Mines Company did not prosper, and the plaintiffs, being stockholders, brought this suit, asking for an accounting by McNicholas and the appointment of a receiver. The court appointed L. C. Hudson as receiver.

As a basis for this suit, after the formal allegations as to the corporate character of the defendant corporations, the plaintiffs in their averments stated the following, in substance: After McNicholas purchased the mining property, he caused a pretended corporation to be effected under the laws of the territory of Arizona with an ostensible capital of \$5,000,000, the shares of which were of the par value of \$1 each. Two million shares and over were sold to various persons, among whom were plaintiffs, at from 30 to 75 cents per share. One million shares were pretended to be held in the treasury, and the remainder thereof, about two million, were held by the defendant James H. McNicholas, who never paid upon the mining property any sum other than the \$25,000. The mortgage

was largely fictitious and intended to privately, illicitly and fraudulently benefit him or his associates. McNicholas falsely represented the mining property to be of very great value, the best placer mine in the world, that operations would commence with a production sufficient to pay 1 per cent per month, and that the corporation would acquire good title to the mine. McNicholas concealed the fact of the mortgage. He never transferred the mine to the Arizona corporation nor accounted for the proceeds of the stock sold. Upon discovering the condition of affairs, the plaintiffs caused the Oregon company to be organized, capitalized the same as the Arizona corporation, and placed the stock thereof in the hands of the trustee. McNicholas represented to the plaintiffs and other stockholders that large sums of money would be received from the clean-up of the mine for the season of 1909-1910, but in truth the property was in the possession of a lessee who cleaned up all the gold resulting from the operation of the mine up to February 11, 1910. McNicholas, as the secretary of the Oregon corporation, took charge of the operations thereof during said mining season and represented that more stock must necessarily be sold to cover operating expenses, as a result of which he sold large amounts of stock to the plaintiffs and others for such purpose, but applied no part of the proceeds to the payment thereof, took charge of the clean-ups thereafter, and at the close of the mining season there existed a deficit for operating expenses, none of which has been paid, and for which liens have been filed. The Arizona as well as the Oregon corporation was largely overcapitalized. The property did not warrant a legitimate capitalization exceeding \$1,000,000, and it is necessary that the

same be reduced and canceled in all sums over and above the amounts actually held by *bona fide* subscribers. The plaintiffs further allege that, by reason of the facts set forth, the Oregon corporation is wholly insolvent and unable to continue its corporation business; that all the directors thereof reside outside the State of Oregon, except James McNicholas, who claims and pretends to have a residence in Oregon, but who is in fact most of the time without the state. Plaintiffs pray that a hearing be had; that defendant James McNicholas be required to account for all stock sold by him in both corporations; that the true consideration for the purchase of the mine be ascertained, the amount of the mortgage be fixed, the indebtedness of the company be determined and paid; that a receiver be appointed to take charge of the property; that receiver's certificates be issued for funds for operating expenses and other charges.

The receiver filed his oath and undertaking on August 9, 1910, and on the 27th of that month the court made an order empowering him to borrow money for the purpose of preserving and operating the property, and authorizing the issuance of receiver's certificates, making the same a lien upon the property. On September 13th of that year the plaintiff filed an affidavit and order for publication of summons and affidavit of mailing summons. On September 26th Thomas W. Browning was granted leave to sue the receiver in a suit to foreclose his mortgage. Plaintiffs filed their proof of publication of summons November 19, 1910. On December 1st of the same year a motion for a default against James McNicholas was filed. Thereafter, on December 27th, findings of fact and conclusions of law were filed and a decree rendered and entered which on January 3, 1911, was set aside and

vacated as to the defendant Thomas W. Browning. With permission of the court, Browning filed an answer to the effect that the mortgage executed by McNicholas was genuine, that plaintiffs knew of it, and that it was a first lien upon all the real and personal mining property in the sum of \$85,000, with interest, and prayed that the same be decreed as such. Browning filed a motion February 6, 1911, supported by affidavits to discharge and restrain the receiver, and objected to the receiver being allowed to work the property, borrow money, incur indebtedness, or do anything that would in any way affect his rights in the property. The court overruled the objections and allowed the receiver to work the property, and in so doing he incurred indebtedness amounting to \$4,090.46, including his fees and other expenses. At this time the plaintiffs appeared to have determined that there would be nothing left for them after the satisfaction of the mortgage, or for some other reason abandoned their suit, and about July 10, 1911, the court, on motion of Browning, made an order discharging the receiver. At the time of entering the order, the court left open the matter of the issuance of the receiver's certificates in settlement of the indebtedness and expenses incurred by the receiver. The parties stipulated that the court might order the clerk of the court to issue such certificates, if any should be issued; neither party waiving any objections to the right of the court to do so. On March 11, 1912, the court made an order dismissing this suit, and on the same date made another, authorizing the clerk to issue receiver's certificates in the sums stated above. There were "allowed as a charge against the property in the hands of the receiver." The appellants now contest the right of the court to appoint a receiver to operate

the mine and to authorize the issuance of receiver's certificates for expenses in so doing.

The pleadings further show that nothing was done in this matter for several months. On December 5, 1912, a notice was filed notifying the defendants that the holders of receiver's certificates would make application to the Circuit Court for the appointment of another receiver, and that a hearing would be had on December 26th. It appears that this notice was served upon the defendants by registered mail. On February 24, 1913, an application for the appointment of a receiver was filed by L. C. Hudson and several other holders of receiver's certificates, reciting that these certificates issued by order of the court constituted a lien upon the property of the Old Channel Mining Company, that the property was in danger of deteriorating, and asking for the appointment of a receiver, not only for the conservation of the property of the Old Channel Mining Company, pending the payment of the certificates, but for its operation, for an order to create a fund for the payment thereof, or, if no funds could be so obtained, for an order authorizing the sale of the property to pay the same. On the same date the court made an order appointing J. F. Reddy as such receiver, and authorized him to take possession of all the property, care for and conserve the same against loss and damage, but to incur no expenses without an order therefor, except to file an inventory, and ordered him to give bond before entering upon his duties. J. F. Reddy did not file his bond until April 17, 1913. On July 8, 1913, less than four months after Reddy qualified as receiver, an involuntary petition in bankruptcy was filed against the Old Channel Mining Company in the United States District Court for the District of Oregon. On July 11,

1913, William Ulrich was duly appointed receiver in bankruptcy by said court and qualified as such on the 12th of that month. August 18, 1913, the district court made an order decreeing and adjudging the Old Channel Mining Company bankrupt. Reddy, as receiver, appeared in the bankruptcy case and opposed the adjudication, but his motion was denied. Thereafter the creditors of the company elected William Ulrich trustee of said bankrupt, and he qualified as such. He thereafter, on September 18, 1913, filed a petition in the Circuit Court for Josephine County, asking for an order requiring Reddy, as receiver, to turn over the property of said bankrupt to him, as trustee. This request was denied by the court. On February 4, 1914, the holders of receiver's certificates filed another notice in this cause and served the same on the attorneys for the trustee. In this notice it was shown that these parties would apply to the Circuit Court for such orders and proceedings as might be necessary to enable petitioners to recover judgment and decree as prayed for in their petition filed on February 24, 1913. Ulrich, as trustee, filed his objections to the entry of such order by the court. The court did not order a hearing of these objections, and over the same entered its decree on April 6, 1914, which is hereby appealed from.

J. F. Reddy also represents that an injunction order restraining him, as receiver, from dealing with the property of the Old Channel Mining Company, issued by the United States District Court for Oregon in 1913, was vacated by that court upon his petition filed in November, 1914, and that a proposition to lease the mine with an option to purchase has been made to him as such receiver.

MODIFIED AND REMANDED.

For appellants there was a brief over the names of *Messrs. Colvig & Roberts, Messrs. Durham & Richard* and *Mr. Jacob E. Dittus*, with an oral argument by *Mr. G. M. Roberts*.

For respondent J. F. Reddy, as receiver, there was a brief and an oral argument by *Mr. Asa C. Hough*.

MR. JUSTICE BEAN delivered the opinion of the court.

It is first contended by counsel for the appealing defendants, whom we will hereafter style defendants, that the appointment of the first receiver, L. C. Hudson, was void because made *ex parte* and without showing why notice was dispensed with, and hence all charges made and expenses incurred by this receiver were without authority and constituted no lien upon the property of the Old Channel Mining Company. The position of counsel for J. F. Reddy, as the present receiver, the only person appearing to represent the holders of the receiver's certificates as respondent, is that any irregularity in the appointment of the first receiver was waived; that the appointment was acquiesced in by the Old Channel Mining Company and Thomas W. Browning, its trustee; and that the claims of the holders of the receiver's certificates for the fees of the receiver and expenses of caring for the mining property and operating the same are valid liens upon the property. It seems that the uncontradicted assertions in the complaint and application of the stockholders of the Old Channel Hydraulic Mines Company to stay the hand of James H. McNicholas in the misapplication of the proceeds of the sale of shares of stock and output of the mine, for an accounting and cancellation of certificates of stock, and for the appointment of a receiver to take charge of and preserve

the mining property, constituted at least a *prima facie* case for the proper appointment of a receiver to save the property for whomsoever it might be adjudged to belong; that it was for the best interest of the mortgagee, whose mortgage was assailed but sustained, that such a step should be taken. That the stockholders finally ascertained in the suit that they had been completely swindled, and that nothing would be left for any of them after the satisfaction of the mortgage of \$85,000 held by Thomas W. Browning, trustee, would not change the apparent situation. Their claims were nevertheless *bona fide* and unquestioned. In other words, from necessity the matter did not depend upon the final outcome of the suit. The application showed that the Oregon corporation was insolvent. Section 1108, subdivision 4, L. O. L., authorizes the appointment of a receiver in cases provided for by statute, when a corporation is insolvent: *Wills v. Nehalem Coal Co.*, 52 Or. 70, 76 (96 Pac. 528). As to the service, it was further shown that all the directors resided outside of the state, except James McNicholas, who claimed a residence therein, but who was, for the most part, without the state. He was given an opportunity to be heard a short time afterward, but did not avail himself thereof, and does not appear to be selling any more shares of stock in the corporation or taking any interest herein. Service of process upon defendants was made by publication and mailing soon after the appointment.

4, 5. As a general rule, a receiver should not be appointed *ex parte*, without notice to the parties to be affected thereby, and before they have had an opportunity to be heard in relation to their rights; and even though there is no provision in the statute requiring notice of the application for the appointment of a re-

ceiver, under the rules of equity in matters of appointment of receivers, which govern when not inconsistent with the statutes on the subject, such notice should be given. A defendant may waive any objection to an *ex parte* appointment by acquiescence therein, by failure to interpose a timely objection thereto, or by participating in the proceeding thereafter: 34 Cyc. 117, 162; *Anderson v. Robinson*, 63 Or. 228, 233 (126 Pac. 988, 127 Pac. 546).

6. It may be conceded that the appointment of this receiver was at the time irregular. It appears that the defendants acquiesced therein by failing to make timely objection, and by participating in the proceedings. It should be remembered that the property of the Old Channel Mining Company was held by Thomas W. Browning, as trustee. He was therefore authorized to represent the interests of this company herein. Under the Code, he could bring suit, as such trustee, without joining his beneficiary: Section 392, L. O. L. Thomas W. Browning appeared and answered in the suit and asserted that the mortgage was a first lien upon the property. He partook in numerous other proceedings in the case. He objected to this receiver operating the mine and to the expenses of such operation being made a lien on the property prior to the mortgage, but we nowhere find that he objected to the appointment of this receiver for the purpose of preserving the property, or questioned the authority conferred upon such officer to do so. We conclude, therefore, that defendants acquiesced in the order of the court in this respect, and only objected to the incurring of indebtedness by the receiver in the operation of the mine. It would perhaps have been better form for a temporary appointment to have been made until notice could have been given. Upon the application

of Browning to discharge and restrain the receiver, the court required him to cease incurring expenses and file a report, and, when the same was filed, he was discharged.

7-9. This brings us to the grave question of the standing of the expenses and indebtedness incurred by the receiver, to which objection is made. Property properly placed in the hands of a receiver by order of a court of equity becomes chargeable with the necessary expenses incurred in taking care of and saving it: 34 Cyc. 350. The allowance of \$930 made to L. C. Hudson, receiver, as compensation for his services, was taxable as part of the costs, and as such was entitled to priority of payment as a first lien upon the mining property: 34 Cyc. 351. The other expenses contracted by this receiver for labor and supplies, which were necessary in order to care for and preserve the ditches, machinery and other property of the mine, come within the same rule. The amount of the last-named expenditures cannot be ascertained from the record. The trial court should segregate these items of expense from any there may be not coming within this class, and make an equitable adjustment thereof.

10. As to the debts contracted by the receiver in carrying on the business of the Old Channel Hydraulic Mines Company and operating the mine, the rule announced by this court in *Investment Corp. v. Hospital*, 40 Or. 523, at page 532 (64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627), should be applied. In appointing a receiver of a corporation not *quasi* public in character, or authorizing its receiver to continue its business, a court of equity has no power, in the absence of the consent of prior contract lien creditors, to decree that the indebtedness of the defendant Old Channel

Hydraulic Mines Company shall take precedence over such prior contract liens as the mortgage held by Browning as trustee. As said by Mr. Chief Justice BEAN in *Investment Co. v. Hospital*, 40 Or., at page 533 (67 Pac. 195, 56 L. R. A. 627):

“But under none of the authorities is a court authorized to thus displace contract liens upon the property of individuals or private corporations.”

Any other rule would open the way to impair solemn obligations and destroy vested rights. The authority to displace prior contract liens is an exception and not the rule. This extraordinary power is ordinarily exercised by a court of equity only as against parties who seek its aid, and is usually restricted to cases of railroads and other like corporations of a *quasi-public* character. It cannot be extended so as to give unsecured creditors of an ordinary corporation preference over prior contract liens: 34 Cyc. 356; *Merriam v. Victory Mining Co.*, 37 Or. 321 (56 Pac. 75, 58 Pac. 37, 60 Pac. 997); *McCornack v. Salem Ry. Co.*, 34 Or. 543 (56 Pac. 518, 1022); *Wood v. Guarantee Trust Co.*, 128 U. S. 416 (32 L. Ed. 472, 9 Sup. Ct. Rep. 131); *Hanna v. State Trust Co.*, 70 Fed. 2 (16 C. C. A. 586, 30 L. R. A. 201); *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.* (C. C.), 50 Fed. 481 (16 L. R. A. 603).

11. The claims for expenses in operating the mines, not shown to be necessary for the care and preservation of the property, should be paid, as far as possible, from the income realized from the mine. In equity all the funds so obtained should first be applied to such payment, and if any part thereof has been diverted or applied for other purposes, either in the payment of the fees of the receiver or other expenses

incurred in caring for the property, the matter should be corrected, and, if not paid, an equal amount should be declared a first lien upon the property in question and, when realized from the proceeds thereof, applied to such payment. If any balance of such operating expenses remains unsatisfied, it should share with other like claims.

12. It is next suggested by defendants that, by reason of the foreclosure and sale under the Browning mortgage, the property, as bought in by him, was free from any claim or charge by reason of the receivership. The decree in the foreclosure suit is merely mentioned in the record. It is not pleaded, and the provisions thereof are not before us. We cannot assume that the trial court made conflicting orders or decrees. The receiver was appointed, and the necessary expenses authorized before such suit was instituted. The receiver's certificates are only evidence of the claims. The clerk issued them upon the stipulation of the parties for convenience, and they have the same force and effect as though issued before the receiver was dismissed.

13. The appointment of J. F. Reddy as the second receiver is assigned as error, and it is contended that such order authorized him to act merely as a custodian and caretaker of the property. We think the point is well taken. At the time of making the order, the original suit had served its full purpose and had been dismissed as to everything, except the settlement of costs and expenses. The appointment was made upon the application of persons who were strangers to the record. Plaintiffs had abandoned the suit, and the defendants objected to granting him the authority of a receiver. He was named as receiver of a different corporation than Hudson, the first receiver. A

court of equity has no jurisdiction or authority to appoint a receiver, except as ancillary to an actual pending suit. As such court it has no inherent power to appoint a receiver of an insolvent corporation: *McNary v. Bush*, 35 Or. 114 (56 Pac. 646); *Young v. Hughes*, 39 Or. 586 (65 Pac. 987, 66 Pac. 272); *Anderson v. Robinson*, 63 Or. 228, 233 (126 Pac. 988, 127 Pac. 546); *High on Receivers* (3 ed.), § 17; *Smith on Receivership*, §§ 228, 371 et seq.; *Vila v. Grand Island etc. Co.*, 68 Neb. 222 (94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 4 Ann. Cas. 59, 63 L. R. A. 791); *State ex rel. v. Ross*, 122 Mo. 435 (25 S. W. 947, 23 L. R. A. 534).

14. Soon after this appointment the Old Channel Mining Company was adjudged a bankrupt, and its duly qualified trustee in bankruptcy applied for an order of the trial court requiring J. F. Reddy to turn over the property belonging to the bankrupt to him. All the claims represented by the receiver's certificates have been presented and allowed in the bankruptcy proceedings. It would seem more consistent with an orderly administration of the affairs of the bankrupt and less likely to result in confusion for such an action to be taken. The federal bankruptcy law is paramount, and it appears that it was invoked in *Re Old Channel Mining Company*, and thereafter it was necessarily exclusive: *In re Watts*, 190 U. S. 1 (47 L. Ed. 933, 23 Sup. Ct. Rep. 718).

Although J. F. Reddy was appointed receiver prior to the bankruptcy proceedings, he did not file his bond or oath, nor take possession of the property, nor in any manner comply with the order of the court until less than four months prior thereto. Under these circumstances, the court of bankruptcy was legally empowered to control and administer the affairs of

the insolvent estate: *Southern Loan & Trust Co. v. Benbow* (D. C.), 96 Fed. 514.

The decree of the lower court of April 6, 1914, authorizing J. F. Reddy, as receiver, to sell the property of the Old Channel Mining Company described in the record, will be reversed as to that part of the decree, and the cause will be remanded to the lower court, with directions to modify the order declaring the receiver's certificates to be first liens upon the property, as above indicated, and that J. F. Reddy be authorized to deliver the property in question to the trustee of the Old Channel Mining Company, bankrupt. Under all the complicated circumstances of the case, the costs should be taxed against the property involved; and it is so ordered.

MODIFIED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and
MR. JUSTICE HARRIS CONCUR.

Argued April 2, reversed April 20, rehearing denied May 18, 1915.

SUSZNIK v. ALGER LOGGING CO.

(147 Pac. 922.)

Pleading—Defenses—"Inconsistent Defenses."

1. Defenses are not inconsistent when they may all be true, and are only inconsistent when some of them must necessarily be false if others are true, and in such a case they cannot be united.

Pleading—Defenses—Inconsistent Defenses.

2. In an action for injuries based on the theory of the relation of passenger and carrier between plaintiff and defendant, an answer setting up the Workmen's Compensation Act as affording the remedies for plaintiff, and alleging that plaintiff was guilty of negligence, does not set forth inconsistent defenses, though allegations in the first defense that plaintiff was riding on the train without the consent or knowledge of defendant, and of plaintiff's negligence, are irrelevant, because under the compensation act such questions are eliminated.

Carriers—Injuries to Passengers—Existence of Relation—Issues.

3. Where the complaint, in an action for a personal injury, alleged that the relation of passenger and carrier existed between plaintiff and defendant at the time of the accident causing the injury, defendant could plead and prove that the relation of master and servant existed, and that plaintiff must resort to the relief afforded by the Workmen's Compensation Act.

Carriers—Master and Servant—Passengers—Existence of Relation.

4. Plaintiff visited an office of defendant, seeking employment, and was directed by the person in charge thereof to go to defendant's camp near a designated town to begin work. When he reached the town, he went to defendant's logging train, and was there directed by the engineer to place his baggage on the pilot of the engine and get aboard. He rode on the pilot to the logging camp. Before leaving the immediate vicinity of the train, he was injured. He did not do any work or receive any compensation from defendant prior to the accident. *Held*, that the relation between the parties was that of passenger and carrier, and not of employee and employer, within the Workmen's Compensation Act.

Appeal and Error—Harmless Error—Erroneous Rulings on Pleadings.

5. Where the relation between plaintiff, suing for a personal injury, and defendant, was that of passenger and carrier, the striking out of defendant's plea of the Workmen's Compensation Act was not prejudicial.

Carriers—Injuries to Passengers—Contributory Negligence.

6. An answer, in an action for injury to a passenger, which alleges that plaintiff was transported by defendant on its logging train gratuitously solely for the benefit of plaintiff and defendant in connection with the business in which defendant was engaged, and that plaintiff, on reaching his destination, ran in front of the engine and was injured, sets forth plaintiff's contributory negligence, though it does not admit any negligence of defendant.

[As to who are passengers on a train, see note in 61 Am. St. Rep. 65.]

From Multnomah: THOMAS J. CLEETON, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action for damages resulting from personal injuries. On the 25th day of August, 1913, plaintiff applied to the Evans Employment Company, of Portland, under the name of Joe Wagner, for a job as a "wood buck" or wood-chopper. He was given what is referred to in the testimony as a "ticket" or "employment ticket," which appeared upon the face to be a contract between plaintiff and the employment

bureau, whereby the latter was to find employment or refund the fee of \$1 which plaintiff paid therefor. This ticket reads as follows:

"Must have blankets and pay own fare \$1.50. Evans Employment Company, 20 North Second Street, Portland, Oregon, P. S. Phone Main 1639, Home Phone A-3074. Licensed. Bonded. Received from Joe Wagner the sum of \$1 for which we agree to furnish correct information by which the above-named employee shall be enabled to secure a situation with Alger Logging Company at 818 Spaulding Bldg., as wood buck, wages \$2.50 per day, board \$5 per week. Hospital \$1 per month. Failing to do which we promise to refund the above amount paid, and the fare for transportation actually paid to and from the place where said applicant is sent by said agent, on return of this receipt, together with a written statement from the employer or other evidence that the applicant could not get the situation. This ticket is good for a job, any time within 31 days from date of issue; and for which the fee is the same as stated herein; except where transportation is furnished. Not responsible for loss of ticket. Evans Employment Company, by F. B. C. Report at this office for directions 10 A. M. to-day. Not transferable. No money returned after two days. I the undersigned received directions to the above-stated position at —, and agree to go as directed. Failing to do which I forfeit all right to the position and the fee paid for the information. I am thoroughly experienced as above. Signature of employee: —. Ticket No. 2425. Order No. 229. Ordered by B. Alger."

Upon the reverse side the following is printed and written:

"Take Str. Harvest Queen at 8 P. M. from Ash Street Dock to Skamokawa, Washington. Report Alger Logging Co., 818 Spaulding Bldg., 3rd and Washington St. To the employer. This should be filled out and signed by the employer in case the posi-

tion is not open for applicant. Under no consideration should this be signed if the position is open as stated hereon and you need the applicant for the position. Time and date this ticket was presented: _____. The bearer was not employed for the following reasons: _____. Employer's signature: _____."

Pursuant to instructions, plaintiff took this ticket to the office of the defendant corporation in the Spaulding building in Portland, where he presented the same, and, under its instructions, took the steamboat to Skamokawa, Washington. He there placed himself and baggage upon the pilot of the locomotive which moved backward pushing defendant's logging cars from the river to the logging camp. When the train reached the camp, the cars were backed into a roundhouse. The locomotive stood still long enough for the brakeman to set the brakes upon the trucks and uncouple them from the engine which then moved forward for the purpose of unloading at the cookhouse some freight from the cab or tender. Just as the engine started it struck the plaintiff, and he received the injuries upon which the action is based. The plaintiff testifies that, when the train stopped, the engineer told him to get off, and while he was doing so, with his suitcase and blanket-roll in his hands, the locomotive started without any warning, and he was thrown down and injured. Defendant contends that he was standing at the side of the engine, and, when it started, he recklessly ran in front of it for the purpose of getting his baggage, and was hurt by his own negligence.

The complaint is based upon the theory that, at the time of the accident, the parties sustained the relation of passenger and carrier. The answer, after a series of denials sets up for the first affirmative defense that

plaintiff was an employee of defendant at the time that he received the injury, and was therefore compelled to look to the Workmen's Compensation Act of the State of Washington for indemnity, since by that law all remedies for such injuries by actions at law are abrogated. This defense is complicated by an additional allegation to the effect that, at the time of the accident, the plaintiff was riding upon defendant's locomotive without its knowledge or consent, and the further language as follows:

"The plaintiff thereupon, seeing said engine in motion, and being then at his destination, ran in front of same in order to remove his baggage, which he had placed on the cowcatcher, and was injured."

The second affirmative defense is, in effect, contributory negligence. In the statement thereof it is alleged, among other things, that:

"On or about the 26th day of August, 1913, plaintiff was transported by the defendant on its logging train from Skamokawa to defendant's logging camp gratuitously and without consideration therefor and not in performance of any contract, express or implied, between the defendant and plaintiff to furnish the same to plaintiff on account of his being in defendant's employ and not in partial payment or otherwise of any labor performed or to be performed by plaintiff for defendant, but solely for the mutual benefit and convenience of plaintiff and defendant in connection with the business in which the defendant was engaged and in which the plaintiff was employed."

Upon filing this amended answer, plaintiff moved the court to require defendant to elect between its two affirmative defenses upon the ground that they are inconsistent and to strike out the one not so elected. This motion was allowed by the court. Defendant having elected to stand upon the first affirmative de-

fense, plaintiff then moved to strike therefrom certain paragraphs, consisting of allegations setting out the several provisions of the Workmen's Compensation Act of the State of Washington and an alleged ruling of the "Industrial Insurance Commission of the State of Washington," purporting to be an interpretation of the compensation act and its application to the facts of the case at bar. The motion also went to that part of the first defense which reads:

"The plaintiff thereupon seeing said engine in motion, and being then at his destination, ran in front of the same in order to remove his baggage, which he had placed on the cowcatcher, and was injured."

This motion was allowed by the court, and the cause proceeded to trial. From a judgment for plaintiff, defendant appeals. REVERSED.

For appellant there was a brief over the name of *Messrs. Wood, Montague & Hunt*, with an oral argument by *Mr. Isaac D. Hunt*.

For respondent there was a brief over the names of *Messrs. Littlefield & Smith* and *Mr. Lon L. Parker*, with oral arguments by *Mr. Parker* and *Mr. Isham N. Smith*.

MR. JUSTICE BENSON delivered the opinion of the court.

There are some 35 assignments of error which we shall consider as far as necessary to a determination of the case.

1, 2. The first of these is that the trial court erred in requiring the defendant to elect between its affirmative defenses upon the ground of inconsistency. This court has frequently passed upon the question here presented, and the rule is quite clearly expressed

by Mr. Chief Justice THAYER in the case of *McDonald v. American Mortgage Co.*, 17 Or. 633 (21 Pac. 886), when he says:

“The rule, as I understand it, in regard to inconsistent defenses, is that defenses are not inconsistent when they may all be true; that they are only inconsistent when some of them must necessarily be false, if others of them are true; in such a case they cannot be united.”

This has been reiterated by this court in several later cases. Applying such test to the answer in the present case, we must conclude that there is no inconsistency between the plea of the compensation act and the plea of negligence, for both may well be true. It must be conceded that the allegation in the first defense that plaintiff was riding on defendant's train without its consent or knowledge, and the further averment of plaintiff's negligence, were irrelevant, since, under the compensation act, all questions of this sort are entirely eliminated. These allegations were mere surplusage, in no way affecting the vital elements of the defense, therefore might properly have been stricken out. The court erred in requiring the defendant to elect.

3. The second assignment is that the court erred in striking out the defense of the Workmen's Compensation Act. This ruling of the trial court was evidently based upon the theory of plaintiff's counsel that, since the complaint alleges that the relation of passenger and carrier existed at the time of the accident, the defendant should be limited to denials. We cannot agree with court or counsel in this, but must insist that defendant was clearly entitled to plead and prove if it could, that the relation of master and servant existed, and that, by reason of the compensation act

of the State of Washington, the courts of Oregon were without jurisdiction to entertain the action. It follows that the court erred in this respect also.

4, 5. This brings us to a consideration of the evidence upon the question as to what was the true relation of the parties at the moment of the injury. They agree in their allegations that plaintiff was not a passenger for hire. There is no substantial conflict in the evidence as to the facts upon which we are to determine whether or not the relation of master and servant then existed. Plaintiff had visited the Portland office of defendant, and had there been directed by the person in charge to go to its camp near Skamokawa, Washington, to begin work. When he reached Skamokawa, he went to the defendant's logging train, and was there directed by the engineer to place his baggage upon the pilot of the engine and get aboard. He rode upon the pilot to the logging camp. Within a very brief period of time after such arrival, the accident occurred. He had not left the immediate vicinity of the train, had not reported to the foreman, had not spoken to anyone in charge, was not upon the pay-roll, and never did do any work or receive any compensation from defendant. Under these conditions, we are called upon to determine whether or not the plaintiff was an employee of defendant in the sense that he was entitled to indemnity under the compensation act of the State of Washington, and thereby barred from bringing this action:

This is the first time we have been called upon to consider a compensation act, but this court has indicated quite clearly a reasonable test as to the relation of master and servant in the recent case of *Putnam v. Pacific Monthly Co.*, 68 Or. 54 (136 Pac. 835, Ann. Cas. 1915C, 256, 45 L. R. A. (N. S.) 338), wherein Mr.

Chief Justice McBRIDE in the opinion upon rehearing says:

“The testimony shows that deceased was employed by defendant as a stenographer on the fourth floor of the building; that her duties began at 8:30 in the morning; and that the accident happened at 8:20. At the time of her accident her time was her own. She was not the servant of the defendant until it was time for her to begin such service.”

The case at bar is still more decisively differentiated in that plaintiff had never worked for defendant, and had never reached the point where work could be assigned to him. We have read with care the English cases cited in the briefs, but they are not convincing upon the facts before us. The case most nearly in point is that of *Leonard v. Baird & Co.*, 38 Scot. Law Rep. 649, but in that case the injured person had been employed to work in a coal mine. He had gone down into the pit. Before commencing work his lamp went out, and he took it and lighted one, borrowed from a fellow-workman, to the lamp station. While he was returning, he was crushed by a rake of hutches, and died from his injuries. Even under this state of facts, the court was reluctant to hold that he came within the provisions of the compensation act. There is no doubt that he was engaged in the employment of the company. The facts in the case at bar are very different. It is true that the defendant has pleaded in his answer and tendered in evidence a written opinion of the Industrial Insurance Commission of the state, based upon a reading of the complaint in this action, in which it held that the plaintiff is entitled to indemnity under the compensation act. But the same was prepared and delivered by two members of the commission in Portland, unofficially, since there was

no application for such compensation pending before them, and it does not impress us as having any more binding effect than a private expression of opinion by a trial judge upon the street corner. We conclude that plaintiff was not engaged in the employment of defendant at the time he was hurt. From this conclusion we reach the further inference that defendant suffered no substantial wrong by reason of the trial court's action in striking out of its first affirmative defense, the allegations relating to the compensation act, since, under the evidence, such defense must necessarily fail.

6. We next consider the effect of the order of election which resulted in striking out defendant's plea of contributory negligence. Plaintiff insists that it is not a plea of contributory negligence, because it does not admit any negligence upon the part of defendant, and cites a number of authorities supporting his position. However, this court in the case of *Edlefson v. Portland Ry., L. & P. Co.*, 69 Or. 25 (136 Pac. 834) has settled the question. In this case Mr. Chief Justice MOORE says:

“Though a process of reasoning seems to support the rule thus announced in cases where contributory negligence is specially alleged as a defense, it is believed that where, as in the case at bar, the answer denies the negligence charged in the complaint, and avers specially that the injury complained of was caused by the carelessness of the person hurt, without alleging that such negligence was contributory, the special plea is not equivalent to a confession and avoidance. It is possible that the injury might be sustained by a person *sui juris* without any negligence on the part of the party owning or controlling the instrumentality causing the hurt. In such cases, to hold that the answer must confess negligence, so as to

avoid its consequences, in order to introduce evidence of the carelessness of the person hurt, is to place the defendant at a great disadvantage before the jury."

We conclude, therefore, that defendant was entitled to have the jury instructed upon the law of contributory negligence, and that the trial court erred in refusing such requested instruction. For these reasons it is not necessary to consider the other assignments of error.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED. REHEARING DENIED.

Argued April 13, affirmed April 27, rehearing denied May 18, 1915.

CHANCE v. GRAHAM.*

(148 Pac. 63.)

Witnesses—Credibility—Voucher by Calling.

1. A party who calls a witness thereby vouches for his credibility.

Evidence—Hearsay.

2. Hearsay evidence is incompetent.

Trust—Action to Establish—Evidence—Declarations of Decedent.

3. Where plaintiffs sued to establish a trust in their favor in land conveyed to defendants by their father, declarations by the father, to a plaintiff, that there was an agreement in the room where he was sick, signed by defendants, to the effect that the land was to come back to him after his debts had been paid, were not admissible as hearsay, under Section 732, L. O. L., providing that, when a party to a proceeding by or against an executor or administrator appears as a witness in his own behalf or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject matter in his own favor may also be proven; since the instant suit was not such a proceeding by or against an executor or administrator.

*The authorities passing upon grantee's oral promise to grantor to hold in trust as giving rise to constructive trust are reviewed in an extensive note in 39 L. R. A. (N. S.) 906.

As to parol agreement to take title to real property, sell the same and account for the proceeds, as affected by statute of frauds, see note in 20 L. R. A. (N. S.) 298.

REPORTER.

Trusts—Trust in Land—Statute—Sufficiency of Evidence.

4. In an action to enforce a trust alleged to have been declared by decedent in conveying land to defendants, evidence *held*, insufficient to establish such trust under Section 804, L. O. L., providing that no estate or interest in real property other than a lease for a term not exceeding one year nor any trust or power concerning such property can be created except by operation of law, or by an instrument in writing subscribed by the party so creating the trust, or his lawful agent, and executed with the formalities required by law.

[As to creation of trust in land by parol, see notes in 115 Am. St. Rep. 774; Ann. Cas. 1913A, 954.]

Trusts—Resulting—Constructive.

5. Resulting and constructive trusts cannot be created by acts of the parties involved subsequent to the conveyance; since they are obligations imposed by law, which is constantly operant, attaching the consequences to be derived from the acts of the parties without delay.

Trusts—Constructive Trusts—Sufficiency of Evidence.

6. In an action to enforce a constructive trust alleged to have arisen through the fraudulent intent of the grantees of land not to reconvey, evidence *held* insufficient to establish such trust.

Trusts—Constructive Trust—Deed Absolute on Face—Contradiction—Evidence.

7. The law requires the most clear, explicit and satisfactory evidence to establish a constructive or resulting trust contrary to a deed absolute on its face.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by Kate Buchanan Chance, Sarah Merchant Graham and Rose Buchanan Graham against Robert B. Graham, John W. Graham, William W. Graham, Lillie A. Young, Jane M. Galbreath and Marion C. Young.

The plaintiffs and the defendants Lillie A. Young and Jane M. Galbreath are daughters of John Wallace Graham, deceased. The defendants of that name are his sons, and Marion C. Young is the husband of Lillie A. Young. The substance of the complaint is that on April 5, 1897, the father owned 308.9 acres, with other land; that he was heavily involved, the realty being mortgaged and in danger of being lost by foreclosure,

under which circumstances the owner conveyed it to the two defendants Young to manage and pay off, not only the mortgage, but also a personal debt from the grantor to Marion C. Young. To that end they were authorized to convey the property for the purpose of realizing funds, together with expenses and payment for the services of the grantees, and, if any of the property were left, it should be reconveyed to the grantor, if then living; otherwise to the plaintiffs and the defendant sons share and share alike. It was recited as a condition that, if the division of property could be made so that the sons might receive the realty and the plaintiffs a proportionate share of their father's estate in money, the distribution should be so made, but that in any event the plaintiffs and the defendant sons were to take in equal parts. It is said that the defendants Jane M. Galbreath and Lillie A. Young were to be excluded from the distribution on account of previous advancements having been made to them by their father. The pleading goes on to state that the defendant Marion C. Young, subsequent to the death of the grantor, succeeded in discharging all the indebtedness by sale of a portion of the premises, and that, after fully reimbursing himself for all moneys loaned and services rendered, there remained the 308.9 acres already mentioned, but there was no money for distribution to the plaintiffs. It is further narrated that in the latter part of December, 1903, and the early part of the following January, the defendants Young conveyed the land to the defendant brothers in substantially equal several parts. It is charged that each of the conveyances was made without consideration, and that all parties thereto had knowledge of the circumstances under which the title passed from the father to his daughter and son in law.

The prayer is to the effect that the sons be compelled to account for the rents and profits accruing since the conveyances to them; that they be held as trustees for the plaintiffs for an undivided half of the property; and that whoever holds the title, whether the Youngs or the sons, be required to convey to the plaintiffs accordingly. The defendants, except Jane M. Galbreath, admit the original title of the father, his deed to the Youngs, his large debt, his death intestate, and the conveyances to the sons; otherwise they deny all the averments of the complaint. Jane M. Galbreath makes similar admissions, denies the advancement to herself, and affirmatively contends that each of the daughters of John Wallace Graham named in the complaint is the owner of, and entitled to, an undivided one-eighth interest in the realty in question. Her affirmative answer was denied. Upon these issues the Circuit Court made findings of fact and conclusions of law favorable to the defendants and a decree dismissing the suit and the cross-bill so called of the defendant Galbreath. From this decree the plaintiffs and the defendant Galbreath appeal.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Messrs. Chamberlain, Thomas & Kraemer* and *Mr. Charles D. Latourette*, with oral arguments by *Mr. Warren E. Thomas* and *Mr. Latourette*.

For respondent *Jane M. Galbreath* there was a brief over the names of *Mr. P. C. Wood* and *Messrs. Dimick & Dimick*, with an oral argument by *Mr. Wood*.

For other respondents there was a brief with oral arguments by *Mr. A. E. Clark* and *Mr. John F. Logan*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1-4. The plaintiffs called as their first witness the defendant Marion C. Young, thereby vouching for his credibility. The substance of his testimony, fortified by other evidence, is to the effect that John Wallace Graham was heavily indebted; that the mortgage upon his lands, of which the tract in dispute was a part, had been foreclosed, the property sold, and the time for redemption had nearly expired; that the mortgagor had made various efforts to raise the money to redeem, but without success, had endeavored to get the husband of the defendant Jane M. Galbreath to take the property off his hands, but without avail, had repeatedly tried to get the witness to take it and finally, at the earnest solicitations of the father of his wife, he had taken the conveyance shortly before the time for redemption had expired. The deed appears in the record admittedly in the handwriting of the grantor, the father, who was shown to be a man of affairs, well versed in business forms, and thoroughly conversant with the effect of such documents. Originally he had prepared it running directly to Marion C. Young alone; but at the time of its execution, under direction of the grantor, the notary taking the acknowledgment interlined as a grantee the name of Lillie A. Young. Both the Youngs and the notary unite in testifying that no agreement whatever was made about taking the property in trust or returning any of it either to the grantor or to his heirs, and that it was encumbered for all it was worth. In order to raise the fund for redemption the Youngs were compelled to mortgage, not only the land to be redeemed, but their own farm of 120 acres. The land was situated in Clackamas

County near the present line of the Oregon Electric Railway, but the transactions occurred before that road was completed. Owing to the successful management of the property by Young, who is shown to be a man of good executive ability, together with the general advance in realty values, apparently influenced largely by the subsequent advent of the railroad, he was enabled to extinguish the debts after the death of the grantor, which happened December 3, 1899, and have left the tract in dispute, besides 60 acres which he reserved for himself. According to his testimony he then proposed to distribute this property among the sons, charging the same in some form with the payment of money to each of the plaintiffs, but was unable to get them to agree upon the terms. After much family negotiation upon the subject without results he took the initiative, and conveyed the property as alleged in the complaint in substantially equal portions to the three sons. It appears in evidence that he took back a mortgage from each of them for \$1,066, which he proposed on payment to divide among the daughters. As already stated, the ancestor had died intestate. The reasons given by Young for making the distribution contemplated was that while his grantor was in possession of the estate, and prior to the conveyance in question, he had frequently stated in family conversations that if he died possessed of property he would prefer that the sons should have land and that the daughters should receive money as their portion of his estate. No writing declaring any trust or imposing any limitations upon the title of the Youngs has been introduced in evidence. Over objection of the other defendants, however, Mrs. Galbreath testified that during her father's last illness he told her there was an agreement in the safe in the room

where he was sick signed by Mr. and Mrs. Young to the effect that the place was to come back to him after the debts were paid. She says she never saw the writing, and there is no other witness in all the case who even so much as intimates that he ever heard of such a document. Mrs. Galbreath also declared on oath that soon after her father's death she went into the room and found Mr. Young and his wife had opened the safe and were going through all the papers, at which she protested; but she is contradicted in this respect by other witnesses including Young and his wife. The most that can be said of her testimony on that point is that, if her father told her of such a paper, and if it was in the safe, the Youngs had an opportunity to make way with it. At best, her evidence in that respect ends in a succession of inferences without tangible result. It appears by the uncontradicted testimony of one of the sons that Young had no key to the safe, and that he himself, in the presence of other members of the family, opened it on the day of his father's funeral to see if there were any directions about his burial, and, finding none, they took a picture of their grandmother and a lock of her hair, put them in his father's pocket, and buried them with him, which transaction was the only purpose of examining the contents of the safe. The existence of any such agreement is expressly denied by both Young and his wife. The notary before whom the acknowledgment was taken acted as agent of the one who loaned the money for the purpose of redeeming the land. He testified that nothing whatever was said about any reservation of title by the grantor or the existence of any trust in his favor; that it was understood at the time that the absolute title was vested in Young and his wife; otherwise he would have required Graham to

sign the mortgage with them to cover any possible interest he had in the land. Sarah M. Graham, one of the plaintiffs, refused to have anything to do in the litigation, and did not appear in any of the proceedings. The other two plaintiffs contended in their testimony that an advancement had been made to Mrs. Galbreath at the time of her marriage, and that she was to be excluded from the distribution of her father's estate. They speak in an indefinite way about what Young was to do with the land and the residue after paying the debts, but disclose no situation in any way approaching the procedure required for a contract relating to land even if the same were reduced to writing. The testimony of Mrs. Galbreath about her father's statement concerning a written agreement said to have been in the safe properly may be disregarded for it is purely hearsay. The declarations of her father of which she speaks do not come within the proviso of Section 732, L. O. L.:

"That when a party to an action, suit, or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject matter in his own favor may also be proven."

This is not an action, suit or proceeding such as is there described, and the proviso does not in this case contravene the general rule against the admissibility of hearsay testimony. The declaration of Mrs. Galbreath in that respect is the only trace in the record of any writing declaring the condition under which the defendants Young hold the title to the land involved.

It is said in Section 804, L. O. L.:

“No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law.”

This section declares in unmistakable terms the requisites for creating an express trust in real property. Controlled by this statute, the testimony in hand utterly fails in any respect whatever to establish an express trust. It remains to consider whether there is a resulting trust or a constructive trust.

5. It is taught in *Barger v. Barger*, 30 Or. 268 (47 Pac. 702), that a resulting trust is one where property is purchased with the money of another, though the title is not taken in such other's name; while a constructive trust ensues where the purchase is made and the title acquired secretly and in violation of some duty to the *cestui que trust*. There is no pretense that the title which Young acquired was purchased with any money or other property belonging to anyone but himself. The possibility of a resulting trust is therefore eliminated from our consideration. A careful perusal of the testimony, both oral and documentary, fails to disclose any element of fraud or deceit on the part of the grantees in the deed. The Youngs took the conveyance only after repeated solicitations of the grantor. Instead of seeking it, the property was in a measure thrust upon them. The father thoroughly understood the situation, and was at the end of his efforts to repair his financial affairs. He recognized the hopelessness of the struggle, and, evidently with the desire to bestow the mere chance

upon those near to him, conveyed the mere equity of redemption to his daughter and her husband. It is a strong circumstance against the existence of a trust that he transferred it to the man and wife, instead of to either of them alone. If a trust was intended, it is most likely that he would have bestowed the title upon the one alone best qualified to manage the same successfully, and no good reason is suggested why the confidential estate should be vested in the daughter and her husband together. Moreover, as we have seen, there is no evidence whatever showing an express trust. All the testimony of those who know anything about the subject, or were in a position to know, shows clearly that the grantor bestowed the frazzle of his fortune upon the defendants Young without reservation, and that, too, without any deceit or unfair dealing on their part. It was theirs, and intended to be theirs, to do as well as they could with it; and no advantage can arise to the plaintiffs because fortune smiled upon their efforts. It is true that prior to the death of the grantor the defendant Marion C. Young told the father that he thought he could save a home for him on a certain 40-acre tract, but he explained this as having been made, not in pursuance of any obligation to do so, but purely as a voluntary proposition. The same may be said of his effort to divide the surplus after the debts had been paid. In other words, the sum and substance of the testimony of Young, whom the plaintiffs vouched for as a witness worthy of belief, is that he took the estate devoid of condition, and afterward sought to dispose of it without the compulsion of any agreement whatever.

If a resulting or a constructive trust arose at all, it must have been at the time of the conveyance; for

these are obligations imposed by the law itself in spite of or independent of the actions of the parties themselves. The law is constantly operant, and without delay attaches the consequences to be derived from the acts of the parties. So far as such trusts are concerned, they are not created or established by subsequent acts of any of the participants. The distinction is thus made in *Parrish v. Parrish*, 33 Or. 486, 494 (54 Pac. 352, 355) :

“The essence of the fraud consists in the existence of a wrongful intent at the time to eventually appropriate the property while lending countenance to the belief in the owner that it was designed to be used for, and would finally inure to, his benefit. It differs from a promise with a purpose of complying therewith at the appointed time, and a breach thereof, for it is settled and conceded that a mere failure to fulfill the promise is not fraud, and the statute applies in such a case; but if the evil intent primarily existed, as above suggested, the transaction is fraudulent, and without the statute.”

The doctrine that a trust may originate at the time the title is acquired is taught also in *Barger v. Barger*, 30 Or. 268 (47 Pac. 702), and in *Taylor v. Miles*, 19 Or. 550 (25 Pac. 143).

6, 7. Fraud is never presumed, but must be proven, and the evidence of Young, whose credibility is indorsed by the plaintiffs, is clear and explicit to the effect that he and his wife took the title reluctantly, without condition, and on the bare chance that the venture would be profitable. In the absence of any fraud or unfair dealing by means of which a constructive trust could be impressed upon the transaction, the language used by Mr. Chief Justice WOLVERTON in discussing the case of *Richmond v. Bloch*, 36 Or. 590 (60 Pac. 385), is peculiarly applicable:

“While the land was in the name of Adelaide Bloch, although she held under the parol trust, and was not, in fact or in good morals, according to the allegations of the answer, the real owner, she could have, under the authorities, repudiated the trust, and sold or encumbered the property, at her absolute will and discretion; and no one could have said aught against it or disturbed the transaction, because the real character in which she dealt with the property would not have been susceptible of proof.”

The utmost that can be claimed from the testimony in the case at bar is that the Youngs were not subject to any legal or even equitable obligation which the courts will either recognize or enforce. The only just impression to be derived from the testimony is that, actuated by sentiment or filial respect for the general wishes of the grantor as to the property of which he might have been, but was not, possessed at the time of his death, they sought to divide the remnants as he probably would have done had he been in a situation to do so. It is said by the plaintiffs in argument that a parol trust in land is valid at the election of the trustee; in other words, such a trust, if that term can be coined under our statute, is not enforceable except at the option of the trustee. The plaintiffs are here in position of saying that the defendants Young having done something with the land they acquired must perforce do something more. The plaintiffs are in this dilemma: If the Youngs had executed the so-called parol trust, there would have been no complaint and no suit of this sort; if they have ignored the alleged confidence reposed in them, as well they may, under the authority of *Richmond v. Bloch*, 36 Or. 590 (60 Pac. 385), the plaintiffs have no standing to complain. The law requires clear, explicit and satisfactory testimony to establish a trust contrary to a

deed absolute in terms. This doctrine is established by the following authorities in this state: *Barger v. Barger*, 30 Or. 268 (47 Pac. 702); *Sisemore v. Pelton*, 17 Or. 546 (21 Pac. 667); *Parker v. Newitt*, 18 Or. 274 (23 Pac. 246); *Puckett v. Benjamin*, 21 Or. 380 (28 Pac. 65); *Snider v. Johnson*, 25 Or. 331 (35 Pac. 846); *Oregon Lumber Co. v. Jones*, 36 Or. 83 (58 Pac. 769); *Hall v. O'Connell*, 52 Or. 164 (95 Pac. 717, 96 Pac. 1070).

Much reliance is placed by the plaintiffs on this excerpt from *Gray v. Beard*, 66 Or. 59, 69 (133 Pac. 791, 794):

"The general rule is that an express trust may be proved, not only by express declarations, but also by circumstances from which its existence may be inferred, and to this end evidence of the acts and declarations, either oral or written, of the parties, as well as the surrounding circumstances, may be admitted and considered"—citing 39 Cyc. 80, and other authorities.

This statement was not necessary to the decision there. In that case the uncle of the defendant was in the habit of keeping his realty in the name of some relative, and in consequence thereof had conveyed two tracts of land to the defendant; but it appeared in evidence that the latter had executed return conveyances to the uncle in each of the two instances involved, but they were not recorded. The question of constructive trust was therefore not necessarily involved. The precedents cited in support of the text there quoted from 39 Cyc. 84, are here examined. *Ransdel v. Moore*, 153 Ind. 393 (53 L. R. A. 753), was a case where the writings signed by the trustee were held to be a sufficient declaration of the trust. In *Kendrick v. Ray*, 173 Mass. 305 (53 N. E. 823, 73 Am. St. Rep. 289), a policy of insurance was made payable to

"Taft, trustee." A sealed letter of the testator, the insured, declared Ray to be a *cestui que trust*, but parol testimony was admitted to explain the situation of the parties as a means of interpretation of the writings included in the policy and the sealed letter. In *Chase v. Perley*, 148 Mass. 289 (19 N. E. 398), only personal property was involved. It was not attempted to create a trust in land. In *Barker v. Smith*, 92 Mich. 336 (52 N. W. 723), a husband had conveyed land to his wife to be by her devised to a college. She made the will, but it failed of probate. In a suit to recover the land after her death and an abortive attempt to prove the will, it was held that parol evidence was admissible merely to show the connection between the deed and will on the subject of failure of consideration. *Shelly v. Heater*, 17 Neb. 505 (23 N. W. 521), relates only to personal property. There is a *dictum* in *Lamb v. Girtman*, 26 Ga. 625, to the effect that secret trust may be proven by parol, but no reference is made to any such or the nature of the trust involved. *Gadsden v. Whaley*, 14 S. C. 210, refers only to personalty. *Cave v. Anderson*, 50 S. C. 293 (27 S. E. 693), is not in point, for it does not discuss the subject of trusts in any form. *Ferguson v. Haas*, 64 N. C. 772, depends upon a peculiar statute of that state, and treats of a resulting trust. *Paddock v. Adams*, 56 Ohio St. 242 (46 N. E. 1068), relates to a resulting trust where the father paid the purchase price of land and had title taken in his son's name. *Massey v. Massey*, 20 Tex. 134, turns upon a written admission by the trustee of the existence and terms of the trust. The subject matter involved in *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571 (25 Atl. 487, 33 Am. St. Rep. 944), was money deposited in a bank by the vendor styling himself trustee for his son. In

all these cases where the subject was discussed at all there was involved either a trust in personalty or the construction of a writing in some way declaring the trust. It is believed that no well-considered case under a statute like ours can be found where an express trust was created out of the whole cloth of oral testimony. There are doubtless many instances where it is held that an express trust in realty may be proven by parol, but they are based on statutes which do not contain the provisions cited from our Code. The great weight of authority, however, is to the contrary, and we cannot indulge in any refinements which are adverse to the express declarations of our statute. For instance, in *Insurance Co. v. Waller*, 116 Tenn. 1 (95 S. W. 811, 115 Am. St. Rep. 763, 7 Ann. Cas. 1078), it is held to be settled law in Tennessee that:

“A contemporaneous parol agreement, made at the time of the execution and delivery of a conveyance of real estate, absolute upon its face, that the vendee will hold the property conveyed in trust for a certain person, is not within the statute of frauds, and, aside from the rights of creditors of the original vendor and innocent purchasers from the vendee, vests in the beneficiary of the trust a valid equitable title to the property conveyed, which a court of equity will enforce.”

In that case the owner of land, for the purpose of delaying his creditors, conveyed it to a kinsman with the contemporaneous parol agreement that the latter should hold the property for his heirs and convey the title as the grantor should direct. Afterward the kinsman, on the eve of his wedding, fearing some complication which marriage might produce, conveyed the property to the wife of his grantor upon the same

conditions. Afterward she executed what the court held to be sufficient as a conveyance of the realty to her husband. The court there properly held, as this court did in *Richmond v. Bloch*, 36 Or. 590 (60 Pac. 385), that the parol trust was executed, and hence was valid. Upon the entire record, the opinion is not an authority for an executory trust in land. A note to that case in 115 Am. St. Rep. 763, *supra*, contains an extended discussion of the question. The matter is treated extensively also in the note to *Holmes v. Holmes*, Ann. Cas. 1913B, 1021.

The conclusion is that the testimony fails utterly to show an express trust, and that, while many things have happened which would have occurred had there been a resulting or a constructive trust in the land, yet the great and countervailing weight of the testimony is against any such condition. Merely because the Youngs voluntarily conveyed the land we cannot conclude they were under any obligation to do so.

The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE
and MR. JUSTICE HARRIS CONCUR.

Argued April 13, affirmed April 27, rehearing denied May 18, 1915.

MACCHI v. PORTLAND RY., L. & P. CO.*

(148 Pac. 72.)

Evidence—Opinion Evidence—Competency of Witnesses.

1. A witness with four years' railroad experience, and a witness familiar with the speed of street-cars by observing speedometers while riding on motorcycles and in automobiles running at the side of street-cars, are competent to testify to the speed of a car.

Evidence—Opinion Evidence—Competency of Witnesses.

2. A witness qualified to testify on the subject may testify that a street-car was running faster than the ordinary rate, for the statement implies a basis for comparison.

[As to competency of nonexpert witness to testify as to speed of street-car or railroad train, see note in Ann. Cas. 1913A, 187.]

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.

3. Where witnesses competent to testify testified that a street-car was running at from 15 to 18 miles an hour, error in permitting witnesses to testify that the car was traveling faster than the ordinary rate was not prejudicial.

Evidence—Opinion Evidence—Subjects of Expert Testimony.

4. An experienced motorman may, in response to a hypothetical question describing the type of street-car and the distance covered by it after the application of the emergency brakes, give his opinion as to the speed of the car, because the subject is within the field of expert testimony.

Trial—Evidence—Admissibility.

5. A plaintiff may, as a part of his case in chief, offer evidence in support of his theory, and is not precluded from so doing merely because defendant states something different in his answer.

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.

6. Where, in an action for injuries in a collision with a street-car, the court charged that, at the time of the accident, an ordinance fixed the maximum speed of cars at 25 miles per hour, and that it was not unlawful to run cars within 25 miles per hour, error in admitting a repealed ordinance, limiting the speed to 12 miles per hour, was not prejudicial.

Street Railroads—Collisions—Care Required of Travelers.

7. An instruction, in an action for injuries in a collision with a street-car, that a person could not go on a street-car track without

*As to competency of witness to testify to the speed of cars and other vehicles, see notes in 34 L. R. A. (N. S.) 778, 784, 790.

As to duty to look and listen before crossing tracks of an electric road, see notes in 15 L. R. A. (N. S.) 254 and 23 L. R. A. (N. S.) 1224.

first looking to see whether a car is approaching, but need not stop unless his view is so obstructed that he cannot see any distance, and that, where his view is so obstructed, he must stop and use the degree of care which an ordinary prudent man would use to discover whether a car is approaching, sufficiently submits the issue of the traveler's due care.

Street Railroads—Collisions—Care Required of Travelers.

8. A traveler approaching a street on which street-cars are operated must look and listen for approaching cars to the extent that a reasonably prudent person would do, and a person keeping a proper lookout and listening uses reasonable care.

Street Railroads—Collisions—Care Required of Travelers.

9. Where a traveler, approaching a street on which cars are operated, saw an approaching car in such close proximity that he knew, or should have known, that to proceed to cross was liable to result in a collision, and at the time, by using due care, he could have stopped, but made no effort to do so, he was guilty of negligence; but the fact that a person sees a car approaching does not alone show negligence because of an attempt to cross the track, and the quantum of care necessary must be determined by the proximity and speed of the car and the surrounding circumstances.

Street Railroads—Use of Streets—Rights of Travelers.

10. The right of a street railway company to use a street is not exclusive merely because a traffic ordinance gives cars the right of way as against travelers, and a traveler may proceed to cross in front of an approaching car when he has reasonable ground for believing that he can pass in safety, if both he and those in charge of the car act with due regard to the rights of others.

Trial—Instructions—Construction.

11. The instructions must, to determine their correctness, be considered as a whole, and if, when so considered, they correctly state the law, they are sufficient.

Street Railroads—Instructions—Misleading Instructions.

12. Instructions, in an action for injuries in a collision with a street-car, which impose on the traveler the duty of looking and listening, and which defines the circumstances under which he must stop before crossing a street-car track, and which declares that the traveler must conform to the obligations imposed, with the same care that would have been exercised by a reasonably cautious man, were not objectionable as leading the jury to believe that the rule of ordinary care was the sole standard by which to measure the traveler's conduct.

Street Railroads—Collisions—Injuries to Traveler—Evidence—Admissibility.

13. A traveler, suing a street railroad company for injuries in a collision with a street-car, may explain what he saw and how the situation appeared to him, when he attempted to cross in front of the approaching car, so that the jury may determine whether he in fact used reasonable care.

From Multnomah: THOMAS J. CLEETON, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action by Peter Macchi against the Portland Railway, Light & Power Company, a corporation, for personal injuries resulting from a collision with a street-car in Portland, Oregon. Grant and Second Streets intersect each other; the former extending east and west and the latter running north and south. The defendant maintains two street-car tracks along Grant Street; one track being used for east-bound and the other for west-bound cars. Grant Street is 60 feet wide, and Second Street is about 63 feet in width. On both streets the distance between the property and curb lines is about 12 feet. On Grant Street it is 36 feet from curb to curb. The south rail of the track used by cars going east is $11\frac{1}{2}$ feet from the south curb line along Grant Street, and the gauge of the track is $3\frac{1}{2}$ feet, making the location of the north rail 33 feet from the north property line along Grant Street. Third Street is about 213 feet west of Second Street. The plaintiff was riding on a motorcycle going south along Second Street from 5 to 8 feet from the west curb line thereof and at the rate of 8 to 10 miles per hour. He could not see up Grant Street, on account of buildings obstructing the view, until he reached a point between 35 and 50 feet from the street-car track. He looked when he was about 30 to 35 feet from the track and saw the street-car about midway between Second and Third Streets going east, and, thinking that he had time to cross the track, he proceeded at the rate of speed mentioned with the intention of continuing south along the west side of Second Street; but before reaching the track he looked up the second time, and, discovering that the car was

moving faster than he thought when he first observed it, he turned to the east for the purpose of avoiding the car and with the intention of crossing the track to the south side of Grant Street. The street-car was probably traveling at the rate of 15 miles per hour and possibly faster. The car and the motorcycle collided on Grant and near the east curb line of Second Street, if extended. The complaint charges failure to keep a lookout, neglect to sound a bell, and excessive speed. The defendant appealed from a judgment for the plaintiff. **AFFIRMED. REHEARING DENIED.**

For appellant there was a brief over the names of *Messrs. Griffith, Leiter & Allen* and *Mr. Frank J. Lonergan*, with an oral argument by *Mr. Harrison Allen*.

For respondent there was a brief over the name of *Messrs. Snow & McCamant*, with an oral argument by *Mr. Wallace McCamant*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1-3. The first assignment of error involves the admissibility of evidence. Henry Meeve, Ida Enkeles, Rebecca Barell and Lewis Pitts, witnesses for plaintiff, were permitted, over the objection of the defendant, to testify that the street-car, at or just before the time of the accident, was traveling faster than cars ordinarily ran in the City of Portland; and it is insisted that the admission of such evidence was prejudicial error. A brief statement of the testimony of the witnesses mentioned will enable a better understanding of the possible effect of the questioned evidence. Henry Meeve, with four years of railroad

experience, expressed the opinion that the car was going between 15 and 18 miles per hour. Lewis Pitts, who had become familiar with the speed of cars by observing speedometers while riding on motorcycles and in automobiles when running at the side of street-cars, stated that the rate of speed was about 18 miles per hour, and that the car was going so fast that his attention was thereby attracted. Rebecca Barell expressed her idea of the speed by saying that it was something exceptional and awful fast, and Ida Enkeles described the car as going very fast. Each one of the four witnesses had resided in Portland, had frequently ridden on street-cars in that city, and was familiar with the speed at which cars were ordinarily operated. In addition to the foregoing, it further appeared that George Crawford, who had been a railroad man for 20 years and could estimate speed, testified that the car was traveling not less than 15 miles per hour, and that "it was going pretty fast." Mrs. Alice Westerman could not estimate the speed in miles per hour, but she referred to the car as going awful fast.

Henry Meeve and Lewis Pitts were competent to give an estimate of the rate of speed and did so; and they amplified their testimony by explaining that the car was not only going fast, but was traveling faster than cars were ordinarily operated. Ida Enkeles and Rebecca Barell each stated that the car was running fast, and that the speed was faster than the ordinary rate. Resolved to its final analysis, a description of cars going fast is but a conclusion involving an opinion, and so, too, is the statement that a car is going so many miles per hour, the difference being that the former is less definite than the latter, and yet in both instances the testimony is competent, if the witness

be qualified to speak, the weight thereof being for the jury: 17 Cyc. 107. The declaration that an object, was moving fast implies a basis for comparison, and the statement that the rate of speed was unusual, necessarily involves a comparison. In the case of *Guggenheim v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 150 (33 N. W. 161), two witnesses were permitted to compare the speed of a train at the time of an accident with the speed of the same train on other days, and the court remarked:

“It is probable that in the present case the testimony of these witnesses was of little worth, but yet there was no error in receiving it, and it was competent as far as it went.”

The testimony here complained of merely constituted one way of saying that the car was going unusually fast. While a somewhat different basis of comparison was used, yet the instant case is analogous in principle to *Blue v. Portland Ry., L. & P. Co.*, 60 Or. 122 (117 Pac. 1094). In that case the witness Becker did not disclose what, if any, standard he had in mind when referring to the car as going at a very fast rate; but in the case in hand each of the four witnesses described the speed with relation to the rate at which cars were ordinarily operated, and two of them gave an estimate in miles per hour. Assuming that the standard employed for comparison was too broad and not sufficiently definite, or even conceding that the opinions expressed by the witnesses Ida Enkeles and Rebecca Barell might have been technically objectionable, nevertheless, in the appropriate language of Mr. Justice Moore, as recorded in *Blue v. Portland Ry., L. & P. Co.*, 60 Or. 122 (117 Pac. 1094), we conclude that “from the number of witnesses who, without objection, testified with respect to the rate of

speed, as hereinbefore disclosed, we cannot see how the defendant was prejudiced by the admission" of the sworn declarations that the car was traveling faster than like cars were ordinarily operated in Portland: See, also, *Ball v. Mabry*, 91 Ga. 781 (18 S. E. 64); *Johnsen v. Oakland, S. L. & H. E. Ry.*, 127 Cal. 608 (60 Pac. 170); *Kansas City, M. & B. Co. v. Crocker*, 95 Ala. 412 (11 South. 262); *Louisville, N. A. & C. Ry. Co. v. Jones*, 108 Ind. 565 (9 N. E. 476); *Illinois Cent. R. R. Co. v. Ashline*, 171 Ill. 313 (49 N. E. 521); *Overtoom v. Chicago & E. I. R. R. Co.*, 181 Ill. 323 (54 N. E. 898); *Little Rock R. etc. v. Green*, 78 Ark. 129 (93 S. W. 752); and *Palmer v. Portland Ry., L. & P. Co.*, 56 Or. 262, 265 (108 Pac. 211).

4. The second objection relates also to the admissibility of certain evidence. William Redford, an experienced motorman, answering a hypothetical question which described the type of car and the distance covered after the application of the emergency brakes, declared that in his opinion, based on the conditions assumed in the interrogatory, the car was going about 15 or 17 miles per hour, and that, had the car been moving at the rate of 12 miles per hour, it could have been stopped within 40 feet; and like testimony was given by Alfred Gannon, another experienced motorman. The record discloses that the street-car ran 84 feet from the point of impact before coming to a complete stop. One of the issues was the rate of speed attained. The two witnesses mentioned were qualified to speak, and the questions propounded to them could not well have been answered by anyone who did not possess special knowledge of the subject. The evidence was peculiarly within the field of expert testimony, and no error was committed in receiving the answers: *Velenka v. Union Stockyards Co.*, 82 Neb.

511 (118 N. W. 103); *Bladecka v. Bay City Traction & El. Co.*, 155 Mich. 253 (118 N. W. 963).

5, 6. The plaintiff alleged that the defendant ran its car in excess of 12 miles per hour, which was the maximum speed allowed by Ordinance No. 13,177, being the franchise which permitted the company to operate its street-cars on Grant Street. Subsequent to the passage of the ordinance mentioned, another ordinance (No. 26,255), was passed, and by the terms of the latter enactment both street-cars and motorcycles were limited to 25 miles per hour. It is claimed that error was committed when Ordinance No. 13,177 was received in evidence, because the earlier enactment was repealed by the later one. The passage of the ordinance relied upon by defendant was denied by the reply. The plaintiff was entitled, as a part of his case in chief, to offer evidence in support of his theory, and was not precluded from asserting what he claimed in his complaint merely because the defendant stated something different in its answer. Furthermore, the ordinance complained of, although received in evidence, could not have prejudiced defendant, because the court charged the jury that, at the time of the accident, Ordinance No. 26,255 was in force, and that, by the terms of that ordinance, the speed of both the motorcycle and the street-car was limited to 25 miles per hour, and that it was not unlawful to run the car within 25 miles per hour. The charge to the jury contains the specific instruction that:

“In other words, the court holds that the ordinance limiting the speed by which vehicles traveling upon the streets mentioned in the ordinance including street-cars—that it was not unlawful to run them at any speed within 25 miles an hour, outside of the re-

stricted district, and this section is conceded to be outside of the restricted district."

In other words, the court told the jury that he held, as a matter of law, that it was not unlawful to run at any rate of speed within 25 miles per hour. The instructions, as a whole, are predicated on the theory that the rate of speed prohibited by ordinance was 25 miles per hour, and that it was not unlawful to operate cars within the specified maximum.

7. At the request of defendant the court charged the jury that, if the plaintiff drove out upon the street intersection from a point at which his vision of the approaching street-car was obscured or impaired, then it was the duty of the plaintiff to have stopped or checked the speed of his motorcycle before attempting to cross the track until his line of vision was such that he could see whether or not the car was approaching; and if the plaintiff failed to take this precaution, and, on account thereof, the accident occurred, he was guilty of negligence and could not recover; and then the court, over the objection of defendant, added the following:

"This instruction means that a person should not go upon a street-car track without first looking to see whether or not there is a train approaching. He does not necessarily have to stop, unless, of course, his view up or down the track, as the case may be, is obstructed to such an extent he could not see any distance. In that case he will be obliged to use such precaution as an ordinary careful and prudent man would use to ascertain whether or not a car was approaching him, so as to endanger him if he attempted to cross."

The instructions objected to in effect informed the jury that a person must in any event, and under all circumstances, first look to see whether a train is ap-

proaching before going on a street-car track, but such person is not also required to come to a stop, unless his view is so obstructed that he cannot see any distance; and, if his view is so obstructed that he cannot see any distance, he must stop, and "in that case" is obliged to use the degree of care which an ordinarily prudent man would have used to discern whether a car was approaching.

8. And again at the instance of defendant the jury was told that it was the duty of plaintiff, while driving his motorcycle, not to have attempted to cross or go upon the track of the defendant, without keeping a proper lookout and listening for cars which might be approaching along the track, and if plaintiff failed to take the precaution, and by reason thereof did not see or hear the approaching car until the same was in such close proximity that a collision was inevitable, then the plaintiff was guilty of negligence and could not recover. The defendant complains because of the following addition to the instruction:

"This proper precaution, as he court has said, is the use of reasonable care, such as an ordinarily prudent and careful man would have used or should have used, under the circumstances."

The requested portion of the instruction told the jury that the plaintiff was obliged to keep a proper lookout and listen. It will be observed that the extent of the duty, as described in the requested instruction, was limited by the term "proper." The portion objected to may be construed to mean that the plaintiff was bound actually to look and listen and to do so to the extent that a reasonably prudent person would have done; or it may be considered to mean that, if a person keeps a proper lookout and listens, it is in fact

the use of reasonable care. No fair construction can be conceived of which could have injured defendant in the slightest.

Another assignment of error relates to the giving of a requested instruction and addition thereto.

9, 10. The jury was advised that if the plaintiff drove the motorcycle upon the street intersection when he saw the car approaching in such close proximity that he knew or, by the exercise of due care for his own safety should have known, that to proceed further was liable to bring about a collision, or that he would run the risk of striking against the street-car, and if, at the time he saw the car approaching, he was at such a distance from the track that, by the exercise of due care, he could have stopped and avoided the collision, and if he made no effort to stop, and his failure to do so was the proximate cause of the injuries, then he was guilty of negligence. The language complained of reads thus:

"That means to say that he must have used due care, or must have used ordinary care and caution in the operation of his car at the place and time when he first beheld the car coming down the track toward the crossing. He must have done what an ordinarily prudent and cautious man would have done at that time under all the circumstances of the case. If he did not do that, he would, of course, be guilty of negligence."

If the plaintiff saw the car in such close proximity that he knew or should have known that to proceed further was liable to result in a collision, and if at the time, by using due care, he could have stopped, but made no effort to do so, he would have failed to measure up to the obligation imposed by the law. The fact that a person sees a street-car approaching does not

alone and of itself spell negligence, if an attempt is made to cross the track; but the quantum of care necessary is to be determined by the proximity and speed of the car, plus the surrounding circumstances. The right of the defendant to use the street was not exclusive, even if it be assumed that, by reason of the traffic ordinance, the car had the right of way as against the plaintiff. The driver of a vehicle can proceed at a highway crossing to go over a street railway track in the face of an approaching car, when he has reasonable ground for believing that he can pass in safety, if both he and those in charge of the car act with due regard to the rights of others. Whether there was reasonable ground to believe that the crossing could be safely made was a question of fact for the jury. The ultimate inquiry is whether the plaintiff exercised due care. If he did not have reasonable ground to believe that he could safely cross the track, then he was guilty of negligence. The duty of exercising proper care was at all times imposed upon plaintiff, and the jury was not told that his obligation was different: *Donohoe v. Portland Ry., L & P. Co.*, 56 Or. 58 (107 Pac. 964); *Smith v. Minneapolis St. Ry. Co.*, 95 Minn. 254 (104 N. W. 16); *Davis v. Railroad*, 68 N. H. 247 (44 Atl. 388); *Omaha Street Ry. Co. v. Mathiesen*, 73 Neb. 820 (103 N. W. 666).

11, 12. It is argued that the vitality of the requested portions of the charge was sapped by giving the quoted additions, and that thereby the matter was set at large, leaving the rule of ordinary care as the sole standard by which to measure the conduct of plaintiff. The instructions must be viewed as a whole, and, when so considered, they did not have the effect asserted by the defendant. The jury was plainly and repeatedly told that the law imposed the duty of looking and

listening and under what circumstances a person is obliged to stop before crossing; and it is quite unreasonable to believe that the jury misunderstood or was misled or that the instructions complained of nullified the ones requested and given. The duties imposed upon the plaintiff were specifically defined to the jury, as directed by the rule stated in *Edlefson v. Portland Ry., L. & P. Co.*, 69 Or. 18 (136 Pac. 832). The jury was also informed that the plaintiff was required to meet the defined obligations with the same care and diligence that would have been exercised by a reasonably cautious man; and the triers of the facts were not instructed that less or different caution would satisfy the law.

13. After testifying that, when about 30 or 35 feet from the track, he first saw the approaching car, and that it was at that moment at about the middle of the block between Second and Third Streets, the plaintiff, over objection, answered that: "I thought I had plenty of time to make the crossing." The witness proceeded to explain that, when he took a second look, he discovered that the car was approaching faster than he thought it was when he first observed it, and that he therefore turned east on Grant Street to get out of the car's way; and then, over objection, the plaintiff testified that: "I thought I had time enough to get on the right side of Grant Street out of the car's way." The fact to be decided by the jury was whether plaintiff employed reasonable care. Like testimony has been held admissible in aid of the inquiry.

"The real question, however, is what a reasonably prudent and cautious man, exercising his faculties for his protection, would have done under all the circumstances, and not what the plaintiff thought, although

the result of his deliberate judgment then formed may throw some light upon the subject: *McCrohan v. Davison*, 187 Mass. 466 (73 N. E. 553); *Jeddrey v. Boston & N. St. Ry.*, 198 Mass. 232 (84 N. E. 316).

The plaintiff was entitled to explain what he saw and how the situation appeared to him, and then it was for the jury to say whether, under all the evidence, the plaintiff did in fact use reasonable care.

Having considered all the assignments of error discussed in the brief filed by defendant and finding no prejudicial error, the judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE MCBRIDE concur.

Argued May 5, affirmed May 18, 1915.

TROWBRIDGE v. GILLETTE.

(148 Pac. 876.)

Specific Performance—Right to—Evidence.

1. Evidence held insufficient to show such part performance that the court would grant specific performance of a parol agreement to convey realty.

From Grant: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by B. C. Trowbridge against Earl V. Gillette, Mary Gillette, W. E. Gillette, Augusta Gillette, F. D. Shaw, R. L. Shaw, Alpha Z. Gillette, Delia W. Fisk, D. Walter Fisk, and P. Snyder, for the specific performance of a parol agreement to convey real property and to quiet title to the same. From a decree in favor of defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. D. Leedy*.

For respondent there was a brief with oral arguments by *Mr. J. E. Marks* and *Mr. A. M. F. Kirchheiner*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. Plaintiff had for a long time been the owner of the northeast quarter of the northeast quarter of section 26, township 13 south, range 31 east of Willamette Meridian. The county road ran across the southern extremity of the tract, leaving a narrow strip south of the road which was 80 rods long, 21 rods wide at the west end, and 17 rods wide at the east end. The piece of land south of the road was sold in 1891 to T. A. Willis, who, in May, 1893, sold the same to A. C. Gillette. Plaintiff testifies that some time in the fall of 1893 Gillette was in his debt for a load of apples, and came to his house to settle the claim, proposing that plaintiff accept the tract of land above described as lying south of the road in full payment; that he accepted the offer, but that no conveyance of title was made; that Gillette promised to turn the Willis deed over to one McHaley, who was to act as scrivener in the preparation of the proposed conveyance; that very shortly thereafter he again saw Gillette, and asked for the conveyance, and Gillette again promised that McHaley should prepare it; that Gillette died in 1893; and that in the fall of the same year, after Gillette's death, he called upon McHaley for the Willis deed, but was refused. Plaintiff is corroborated in most of his testimony by his wife and stepson, who at the time of the alleged contract was about 15 years of age. Plaintiff further testifies that he has paid the taxes on

the land since 1893, except for the year 1911, and it was subsequently stipulated by counsel that for the years 1893 and 1894 the land was not upon the tax-roll, and was not assessed to anyone; that the same is true of the years 1900 and 1901; that for 1911 the land was assessed to, and the taxes paid by, the heirs of A. C. Gillette, and the remaining acres of the legal subdivision were not assessed to anyone; that for the other intervening years between 1893 and 1913 the particular legal subdivision as a whole, was assessed to plaintiff and the taxes paid by him. It clearly appears that Gillette did not die until April 10, 1896; that the tract of land below the road, and which is the subject of this suit, was never inclosed, and was of no use or value except for the wild grass or pasturage thereon; that the only act of actual dominion over the same, known to any of the parties, was the effort of Willis, during his ownership, to dig a well thereon. On July 26, 1913, the Gillette heirs, including the widow, conveyed, the land by warranty deed to the defendant Snyder, who has since claimed title and right of possession thereto. It is stipulated that McHaley has been dead for several years. Plaintiff, prior to the purchase by Snyder, informed him that he (plaintiff) was the owner of the land. This constitutes the substance of the evidence so far as it is of serious import.

We are of the opinion that the plaintiff has not made out a case which would warrant a court of equity in decreeing specific performance, particularly in the light of the fact that his suit is brought at so late a date, 20 years after the making of the alleged contract, at a time when the most important witnesses are dead. There has been no such performance as would justify the exercise of this extraordinary power of the court.

Taking up the question of adverse possession, it is sufficient to say that the evidence discloses the fact that nobody has had any such possession as would satisfy an adverse claim.

It follows that the decree of the trial court must be affirmed, and it is so ordered. **AFFIRMED.**

Submitted on briefs May 5, affirmed May 18, 1915.

STATE v. GULLIFORD.

(148 Pac. 876.)

Larceny—Evidence.

1. In a prosecution for larceny of cattle, where there was no proof of the organization or existence of a certain cattlemen's association, except statements by certain witnesses, the refusal of the court to allow defendant to ask a witness, who had testified that he was a member of such cattlemen's association, whether the organization did not make a standing offer of \$1,000 to anyone furnishing evidence to convict another of cattle stealing, was proper, there being no attempt to show any such offer in relation to the pending case.

[As to what constitutes larceny, see note in 88 Am. St. Rep. 559.]

Witnesses—Impeachment—Statute.

2. Under Section 861, L. O. L., providing that the party calling a witness may not impeach him by evidence of bad character, but may contradict him, and may show past statements inconsistent with his present testimony, in a prosecution for larceny, where defendant called a certain witness, the court properly refused to permit defendant to recall him to lay "the grounds for impeachment."

Witnesses—Impeachment.

3. In a prosecution for larceny of cattle, where defendant attempted to impeach his own witness, on the ground of his membership in a cattlemen's association, without proving the existence of such association or its relevancy to the case, such attempt was properly stopped by the court.

[As to impeachment of witnesses, see notes in 73 Am. Dec. 762; 14 Am. St. Rep. 157; 82 Am. St. Rep. 25.]

Criminal Law—Harmless Error—Admission of Evidence.

4. In a prosecution for larceny of cattle, the admission of evidence that defendant, when asked what he had been doing up around where the cattle were stolen, replied that he was doing nothing up there, but just riding around, the admission of such testimony was immaterial and not prejudicial error.

Witnesses—Impeachment—Evidence.

5. In a prosecution for larceny of cattle, a question to a witness for the prosecution, whether before the justice court he had not failed to testify to certain conversations with the defendant as to such defendant's whereabouts at the time of the crime, was properly excluded as incompetent, immaterial and irrelevant, unless it was shown that the witness was asked of such conversations before the justice.

Criminal Law—Trial—Remarks of Court.

6. In a prosecution for larceny of cattle, defendant's attorney stated that his client had admitted a previous conviction, and the court replied: "The defendant still seems to have doubt in his mind." After defendant had commented upon the situation in regard to such conviction, the court further said: "The record shows the defendant pleaded guilty to the larceny of animals, a felony, and was paroled from this court." *Held*, that the court's language was not improper, as giving undue prominence to the previous conviction.

Criminal Law—Appeal—Reservation of Ground of Review—Character of Crime.

7. In a prosecution for larceny of cattle, where the court charged on such crime, the defendant neither excepting to the charge nor requesting further instructions as to the distinction between the crime of driving cattle from the range and larceny, the question whether the proof called for such instructions was not presented for review.

From Umatilla: GILBERT W. PHELPS, Judge.

The defendant, Arthur Gulliford, was indicted, tried and convicted of the crime of larceny of cattle, and from the judgment and sentence following such conviction he appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. L. A. Esteb* and *Messrs. Fee & Fee*.

For the State there was a brief over the name of *Mr. Frederick Steiwer*, District Attorney.

In Banc. MR. JUSTICE EAKIN delivered the opinion of the court.

1. The first assignment of error relates to the refusal of the court, upon cross-examination of the wit-

ness James Nelson, to allow the defendant to question him concerning the reward which had been offered by the cattlemen's association. In the examination of Nelson, after proof that he was a member of the cattlemen's association, he was asked:

"I will ask you if it is not a fact that you have a standing offer of \$1,000 for any person that will furnish the evidence to convict anybody, that you will pay \$1,000 for every conviction?"

This question was objected to as incompetent, irrelevant and immaterial. There is no proof of the organization or existence of the cattlemen's association, other than such statements as made by Nelson and other witnesses that there was such an association; and, as this relates to no offer made to a witness in this particular case, it was therefore incompetent. The court stated, while this matter was under discussion:

"If this matter is coming into this case, it is going to come in the right way. There may be an association covering several states, and there may be an understanding among these witnesses that this association will pay a reward in certain cases. * * The cross-examination is entirely proper, and unless it can be shown there is some connection between that reward and this case, all the evidence will be taken from the jury."

We understand that it is for this reason the evidence was excluded.

2. Assignments 2 and 3 relate to an effort to impeach the witness Nelson, who had been called by and testified on behalf of defendant. Defendant's attorney said:

"I desire to have the record show that I offered to recall the witness for the purpose of laying the grounds for impeachment."

The court excluded this testimony for the reason that it was an attempt to lay the foundation to impeach defendant's own witness. Section 861, L. O. L., provides:

"That party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 864."

The question was not pertinent cross-examination, the witness being called for the purpose of laying the foundation for an impeachment, and the evidence offered was incompetent. The suggestion of improper remarks by the court in ruling upon these questions has no merit.

Assignments of error Nos. 5 and 6 relate to the offer of a reward by the cattlemen's association, but no proof of the existence of the cattlemen's association, or of what it consisted, was offered. These things can be proved only in the regular way, by a person who has knowledge of the facts and is competent to testify in that regard.

3. The seventh assignment is directed against the court's refusal to allow the defendant's witness Lightfoot to establish certain facts in regard to the impeachment of Nelson, without proving any facts in regard to the association, or showing the relevancy thereof to this case.

4. Exception is also taken to the ruling of the court as to the admissibility of the testimony of John Laing, a state's witness, relating to a conversation with Carl Kirk. This matter related by Laing was not material to the case, and did not prejudice Kirk's defense, being in the following language:

"Q. Now, state to the jury what statements, if any, you heard Carl Kirk make at that time with reference to his connection with these cattle.

"A. When Mr. Taylor was talking to Carl, he was out in the barn, and I was out there with them, and Mr. Taylor asked him what he was doing up around the upper country up in Butter Creek, and Carl said he wasn't doing anything up there, and Taylor said he supposed he was just up there riding around, and Carl said, 'Yes,' he was just riding around; they didn't have anything particularly to be after."

The same is true, also, in regard to what Laing testified as to remarks of the defendant Gulliford, and created no prejudice.

Assignment No. 10 relates to questions propounded to Kirk as to a former conviction of crime, which amounted to an impeachment. He said he pleaded guilty to the larceny of personal property, and upon the trial admitted having done so. We find that the court used no improper language, as insisted in the objection.

5. In the examination of the witness John Laing, defendant on his cross-examination asked:

"In your testimony before the justice's court here, you did not testify to any of these conversations, did you?"

This question was objected to as incompetent, immaterial and irrelevant, and the court sustained the objection, in which ruling we find no error, unless it was shown the witness was asked concerning them.

6. The eleventh exception concerns the remarks of the court, giving undue prominence to the fact that the defendant Arthur Gulliford had been previously convicted of a crime. His attorney, speaking of his conviction, said:

"He has admitted that record is correct; he must have done it."

The court replied:

"The defendant still seems to have doubt in his mind."

Defendant answered:

"I said this book shows I pleaded guilty here, but I did not know I had to plead guilty twice to one charge. I suppose it was down at Echo."

The court remarked:

"The record shows the defendant pleaded guilty to the larceny of animals, a felony, and was paroled from this court."

We find that this ruling is correct, and no improper language was employed by the judge. When asked if he had kept faith with the court on his parole, defendant said:

"Nobody accused me, or said a word to me about being arrested upon any claim since then."

To which an objection was sustained, but the answer of the witness was allowed to stand.

The denial of the motion of the defendant at the close of the state's testimony for a directed verdict in favor of defendant was not error. There is sufficient evidence in the record to show that it should have been submitted to the jury.

7. The last assignment of error is:

"The court failed to instruct the jury as to the distinction between the crime of driving cattle from the range, and the crime of larceny."

The charge in the indictment was "take, steal and drive away" the animals named therein. A defense relied upon by defendant was an *alibi*. We find no

question suggested as to the acts complained of constituting some other crime than larceny, and no request was made for other instructions. We find that defendant gives as one ground for his motion at the close of the state's case:

"For the reason, if any crime has been proven in this case, it is the driving of cattle from the range, and not the crime alleged in the indictment."

There was no request nor exception taken, and the question is not here for decision.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

Argued May 4, affirmed May 18, 1915.

MAGILL v. FRENCH, COUNTY JUDGE.

(148 Pac. 878.)

Schools and School Districts—Boundary—Construction.

1. Under Section 3965, L. O. L., declaring that the superintendent and county court, or board of commissioners in counties where the board is a separate body, shall constitute a board for the laying off of the county, in convenient school districts, and such board shall make changes when petitioned to do so, the laying off of boundaries for school districts does not constitute part of the business of the County Court, and a failure to record such action in the journals of the court does not render the proceeding void; the board being a distinct and separate body from the County Court.

Schools and School Districts—Public Schools—Division of District.

2. Under Section 4021, L. O. L., declaring that before any new district shall be established, or change made in the boundaries of any existing school district, the superintendent shall post written notices of the boundaries of the new district and of the session of the board when it shall be done, the expression "session" does not refer to sessions of the county court, but to sessions of the board for changing a district, which is composed of members of the County Court and the superintendent of schools.

Schools and School Districts—Boundaries of District—Change.

3. The law does not require proof of the posting of notices of proposed changes in school districts.

Schools and School Districts—Change of Boundaries—Notice.

4. One attacking a change in the boundaries of a school district, on the ground that no notice was given, has the burden of establishing that fact.

Schools and School Districts—Boundaries—Change.

5. Under Section 3965, L. O. L., providing that the superintendent and the County Court or board of county commissioners shall constitute a board for the laying off of the county into school districts, and may, when petitioned to do so, change districts, the authority of the board does not depend on the number of petitioners for a change or the number of remonstrators.

Evidence—Presumptions—Performance of Official Duty.

6. There is a presumption that officers, such as commissioners of the county and school superintendent, are fair men.

From Wallowa: MR. JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is a writ of review proceeding by S. L. Magill, C. E. Glenn, C. W. Womack and S. P. Crow against the district boundary board of Wallowa County, consisting of J. A. French, county judge, L. Couch and W. P. Newby, county commissioners, and J. C. Conley, superintendent of schools, concerning their action in dividing school district No. 7 and creating out of a portion thereof a district designated as district No. 83. The petition for such division, omitting description of its boundaries, is as follows:

“We, the undersigned, legal voters of school district No. 7 of Wallowa County, Oregon, believing it to be for the best interests of all concerned, do most respectfully ask that the boundaries of said district be changed to read as follows: * * ”

This petition was signed by several legal voters of the district, and was filed July 25, 1914. At the same time there was presented a petition, regular in form and properly signed, praying for the establishment of a new district out of the territory to be taken from district No. 7 by the proposed alteration of its bound-

aries. Notices of the proposed change were issued by the superintendent, but until the issuance of the writ of review and before the return thereof, there had not been filed any proof of the posting of such notices, except a letter from R. H. Haun to the school superintendent, of which the following is a copy:

“Evans, Oregon, 7—31, 1914.

“Mr. J. C. Conley, Enterprise, Oreg.

“Dear Sir: I posted these school notices yesterday, July 30, 1914, one on each postoffice and the others in the most public places on road corners.

“Yours truly,
“R. H. HAUN.”

After the writ had been issued in this case, and before the return thereto had been made, Haun filed an affidavit in the nature of an amended return, showing generally a full compliance with the statute in relation to posting the notices. There was a numerously signed remonstrance against the petitions, but the board ordered the division and the organization of district No. 83. From an order of the Circuit Court, dismissing the writ of review, plaintiffs appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Francis S. Ivanhoe*.

For respondents there was a brief over the names of *Mr. Daniel Boyd* and *Mr. Daniel W. Sheahan*, with an oral argument by *Mr. Boyd*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. It is contended that the proceedings of the judge and county commissioners, sitting with the superintendent in the adjustment of district boundaries, con-

stitute a part of the business of the County Court, and that the failure to make a record of them in the journals of the court rendered the proceedings void. Section 3965, L. O. L., is as follows:

“The superintendent and the County Court, or the board of commissioners in counties where this board is a separate body, shall constitute a board for laying off his county in convenient school districts, such board to be styled the district boundary board. Said board shall make alterations and changes in the same when petitioned so to do, in the manner hereinafter specified; and the superintendent shall make a record showing the boundaries and numbers of all the districts in his county so established and organized. The county judge shall be *ex-officio* chairman of said board, and the superintendent *ex-officio* secretary; except, where the board of county commissioners is a separate body, the chairman of the board shall be chairman. The superintendent and two members of the county board shall constitute a quorum for the transaction of business.”

The phraseology of this section is peculiar, but we are of the opinion that the true intent of the legislature was to constitute the members of the County Court individually *ex-officio* members of the district boundary board, and that such board is a separate and distinct body from the County Court. Under our Constitution as it stood when this law was enacted it was impossible to introduce a fourth member into the County Court for any purpose, and yet such would have been the effect if we should adopt counsel's theory, and this construction would render the law void. The effect of the section quoted is to create a separate and distinct board, charged with the administrative duty of laying out new districts, prescribing their boundaries, and changing when necessary the

boundaries of districts already in existence, and whose proceedings are governed by the statute creating it. The only record of the proceedings of the board which the law requires to be kept is specified in the section quoted, which prescribes:

“The superintendent shall make a record showing the boundaries and numbers of all the districts in his county so established and organized.”

Such record was made in this case.

2. It is contended that the word “session,” used in Section 4021, L. O. L., in connection with the notice of proposed change of boundary, means “session of the County Court,” but this is clearly negatived by the language used, which is:

“Before any new district shall be established, or change shall be made in the boundaries of any existing district, the superintendent shall cause to be posted in three public and conspicuous places in such proposed district, or in each of the existing districts, at least ten days before action is taken, as herein provided, written or printed notices of the boundaries of the proposed new district, or the changes to be made in the boundaries of any existing district, and *of the session of the board* when the same will be done.”

The copies of the notices in the record here show that they comply in form with this requirement.

3, 4. The contention that the action of the board was void because they did not have before them any legal proof that the notices had been properly posted cannot be upheld. As stated in *Nicklaus v. Goodspeed*, 56 Or. 184 (108 Pac. 135), the law does not require any proof of service of notice; and, this being the case, jurisdiction to make the change did not depend upon a return as to the posting of notices, but upon the fact as to whether such notices were actually

posted. In such case the burden of proof is upon the party attacking the proceedings to show that no legal notice was given: *Pagels v. Oaks*, 64 Iowa, 198 (19 N. W. 905); *Foster v. Board of County Commissioners*, 84 Minn. 308 (87 N. W. 921). The letter of Haun, while not sufficient in itself to show that the notices were properly posted, does not indicate that they were not. Considered as a return it is incomplete, and conceding, without deciding, that it and his subsequent amended return, showing full compliance with the statute, should be rejected, the petitioners in this writ cannot contest upon review the sufficiency of the proceedings of the board by reason of lack of proof of posting notices where the statute has not required such proof to be made.

5. In the case at bar the authority of the board to make the change does not depend upon the number of persons subscribing to the petition or remonstrance. It can act favorably upon the petition of only three legal voters against the remonstrance of 300, if in its judgment the change should be made. Neither is it analogous to a petition for locating a public highway, where the property of a citizen may be taken for public use, or of a street improvement, where a tax lien may be created upon the property of a citizen, in which a stricter rule is sometimes observed than in cases like the present, where mere matters of expediency or convenience are involved.

6. There is nothing in the record here to show any abuse of discretion. The board is composed of public officers elected by the people and presumably fair men. They are upon the ground and better capable of appraising the situation than we, who have only the petition and remonstrance from which to judge of the propriety of their action.

We find no substantial error in the record, and the order of the Circuit Court is affirmed.

AFFIRMED.

Argued April 16, reversed May 18, 1915.

SARATOGA INV. CO. v. KERN.*

(148 Pac. 1125.)

Trial—Instruction—Weight of Evidence.

1. Where defendant took title to land, mortgaged it, and executed a warranty deed to the president of a corporation which did not mention the mortgage, and recited an inflated consideration, it was improper, in a suit by the corporation against defendant and the president to recover damages for the act of the president in conveying the land to the corporation at an inflated price, to charge that the fact defendant took title to the property and executed a mortgage, and thereafter gave a warranty deed to the corporate president, did not show fraud, for fraud is a question of fact, which may be established by circumstantial evidence, and it is improper for the court to direct a jury as to inferences to be drawn from any particular evidence.

Principal and Agent—Notice to Agent—Effect.

2. The rule that a principal represented by an agent is charged with notice of matters known to the agent does not apply where the agent is acting fraudulently, and trying to overreach his principal.

[As to notice to agent as notice to principal, see note in 24 Am. St. Rep. 228.]

Corporations—Actions Against Officers—Instructions.

3. The president of a corporation, who was commissioned to acquire land, induced defendant to take title in his own name, to mortgage it, and to execute a conveyance to him which did not mention the mortgage and recited an inflated consideration. The president then transferred the property to corporation for an exorbitant price. Thereafter the corporation sued defendant and the president to recover damages for fraud, and the jury was charged that if the president of the corporation attended to practically all of its affairs, and that in all the dealings with defendant he was acting in his official capacity, the corporation is charged with knowledge of all acts and things done by the president, and could not complain of his conduct, but that if he was acting personally for himself, it was not charged with knowledge. *Held*, that while the instructions should be considered as a whole, it was erroneous in allowing the jury to believe

*As to how far corporation is charged with knowledge of managing officer engaged in illegal act, see note in 2 L. R. A. (N. S.) 993.

that the corporation was charged with notice of the president's act, provided he was acting for it, though intending to overreach his principal.

Corporations—Corporate Officers—Notice.

4. While a principal is charged with notice of facts known to his agent, save where it is the duty of the agent not to disclose, or his interest is adverse to his principal, a corporation is charged with the knowledge of one of its officers, who, though acting for himself, was at the same time the sole representative of the corporation.

[As to notice to officer of corporation as notice to corporation, see notes in 36 Am. Dec. 188; 39 Am. Rep. 322; Ann. Cas. 1915A, 855.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action by the Saratoga Investment Company, a corporation, against C. W. Kern, Lucina Kern and Paul W. Custer.

The circumstances which gave rise to this action extend over a period of several months. Joseph Unterhahrer was the owner of 160 acres of land in Clackamas County, Oregon, and in November, 1910, offered to sell the same for \$5,500 to the defendant C. W. Kern, who owned an adjoining tract. Paul W. Custer, having learned that Kern had an option on the 160 acres mentioned, agreed to give the latter \$6,000 for the property. Custer conceived the plan of organizing a corporation for the purpose of purchasing and handling the land and, having succeeded in interesting the necessary number of persons, in December, 1910, accomplished the formation of a corporation known as the Saratoga Investment Company, of which he was made president. The capital stock was fixed at \$10,000, which was divided into 100 shares of the par value of \$100 per share. Custer subscribed for 98 shares and the two remaining shares were subscribed for by two other persons. The original incorporators planned to subdivide and sell the land as soon as the

Saratoga Investment Company acquired title to the property. It was agreed that Custer would be the sole selling agent, and that he would receive as his commission one third of the proceeds derived from the sale of lots and tracts. Custer represented to the incorporators, as well as to the persons buying stock from him, that the land would cost \$9,700, and by reason thereof it was agreed that he would cause the 160 acres to be conveyed free from encumbrance to the corporation in full payment for 97 shares of the stock subscribed for by him. The incorporators knew that Custer did not have any money, and they contemplated and understood that he would sell his stock and use the proceeds derived from such sales for the purchase of the land; and pursuant to such understanding Custer did sell, between December 5, 1910, and April 20, 1911, 84 shares of stock for about \$8,000. Believing that Custer would complete the sale, Kern advised Unternahrer that the option on the 160 acres would be taken up, and the latter went to Portland for the purpose of closing the business. Custer was not able to raise the necessary funds and Unternahrer returned to his home in California. Thereafter, on or about April 24, 1911, Unternahrer gave and placed a deed in a bank in Portland to be delivered to Kern, who was named as grantee, upon compliance with the terms of the option. The option stipulated that if within a certain time Kern paid \$2,000, then the deed should be delivered to him and he was to pay the balance in two installments of \$1,000 and \$2,500, respectively. Kern and Custer went to the bank on April 28, 1911, and thereupon the sum of \$2,000 was paid to the bank from funds supplied by Custer and acquired by him from the sale of stock; Kern and wife signed two notes payable to Unternahrer for the balance of

the purchase price, and gave a mortgage on the 160 acres to secure the notes, one of which was for \$1,000 and the other for \$2,500. The deed was then delivered, either to Kern or to Custer, and the bank retained the mortgage, notes, and money for Unter-nahrer. The deed was filed for record on April 28, 1911, at 4:20 P. M., but the mortgage was not filed for record until Saturday, April 29, 1911, at 4:40 P. M.

Kern and wife on April 29, 1911, conveyed the land to Paul W. Custer by a warranty deed, recorded May 1, 1911, which recited that the consideration was \$12,000 and made no mention of the mortgage that had been executed on the previous day by Kern and wife, although Custer did deliver to C. W. Kern a writing, together with two notes signed by Custer and payable to Kern and corresponding in amounts to the notes given by Kern to Unter-nahrer, which purported to protect Kern against the mortgage. When asked concerning the failure to mention the mortgage in preparing the deed, Kern testified:

"I asked Mr. Custer if the deed shouldn't show the mortgage. He said, 'No, not necessarily at all.' He says, 'Here is a memorandum agreement that I give you that shows to you and to the world that I am buying this property from you subject to this mortgage,' and he says, 'There is nothing that will be held against you in this matter.' We talked it over, and he says, 'I have notes in my possession from different individuals who have subscribed for stock in this company that will fall due long before these notes will fall due,' and he says, 'These will be taken care of.' He convinced me that was absolutely all right. I didn't know any better, so I accepted this memoranda agreement as being absolutely up and aboveboard."

Custer also stated that if the deed referred to the mortgage, it would be necessary to obtain a release

every time a lot was sold. Kern explained the amount of the consideration expressed in the deed by saying:

“When Mr. Custer said he wanted to raise the price of the property and have it show in the deed, I asked him, ‘Does this cause your stockholders to pay one cent more for the property than what you are actually paying for it?’ and he says, ‘It does not positively.’”

Custer executed a warranty deed which named the Saratoga Investment Company as grantee, recited that \$12,000 was the consideration, but made no mention of the mortgage, and at a meeting of the board of directors held on May 1, 1911, this deed was formally presented to and accepted by the board of directors as full payment for 97 shares of the stock subscribed for by Custer. Thereafter, on May 25th, the directors held a special meeting, and authorized Custer, as president, to make contracts of sale on behalf of the company, and he exercised the authority so conferred until some time in July, 1911, when he left the state. None of the stockholders knew of the mortgage until July 14, 1911, when Kern informed them of the execution of the instrument. Kern did not, at any time, hold any stock in the corporation, and he testified that he understood that the company intended to plat and sell the property, “knew that Custer was the man who represented the Saratoga Investment Company,” and understood that Custer held practically all of the stock of the corporation. The stockholders left the management of the affairs of the company largely to Custer, concurred in his suggestions, and made no objection to any of his proposals. When the \$1,000 note held by Unternahrer became due the amount was paid to him for the corporation, and thereafter this action was commenced

to recover, as damages on account of the mortgage, the sum of \$3,500, with interest at 8 per cent from April 28, 1911.

The complaint alleges that the defendants conspired and agreed that Custer would bring about the formation of the Saratoga Investment Company, be made its president, propose and pretend that the land could be purchased for \$9,700, and that the property would be purchased by him for the corporation for the sum mentioned, but with the intention on the part of all the defendants that the land would be transferred for \$5,500, that the existence of the \$3,500 mortgage would be concealed from the officers, directors and stockholders of plaintiff, and that the defendants would retain the difference between \$9,700 and \$2,000. The answer of the defendants C. W. Kern and Lucina Kern disclaims any conspiracy or fraud, and alleges that Custer was, at all times, acting as the officer of and for the corporation; that the title passed through C. W. Kern as a mere conduit at the request and for the accommodation of Custer, acting as the president and manager of the company, and that the answering defendants acted innocently without any knowledge or intimation of any fraud. Custer was not served; a voluntary nonsuit was granted as to Lucina Kern, and the plaintiff appeals from a verdict and judgment obtained by C. W. Kern.

REVERSED AND REMANDED.

For appellant there was a brief with an oral argument by *Mr. Frederic H. Whitefield*.

For respondents there was a brief and an oral argument by *Mr. L. E. Crouch*.

Department 1. MR. JUSTICE HARRIS delivered the opinion of the court.

1. The principal assignments of error relate to the giving of certain instructions. The jury was instructed:

"That the mere fact that C. W. Kern and Lucina Kern took title to said property and executed a mortgage for \$3,500 against it and thereafter executed a warranty deed to the defendant Paul W. Custer and took back a separate agreement to the effect that Paul W. Custer would protect them against the said mortgage, that the said acts, of themselves, do not constitute fraud, conspiracy or confederacy as against the plaintiff herein. The mere fact that they transferred this and gave a mortgage, that in itself is not sufficient; they must go further and show a conspiracy to either defraud plaintiff, or conceal this mortgage on the property from the plaintiff company."

The complaint charged fraud, and the defendant C. W. Kern was accused of being one of the actors in the conspiracy to damage plaintiff. "Fraud is a question of fact, but it need not be shown by positive evidence, as this can seldom be done. It is generally proved by circumstantial evidence, and may be established by inference, like any other disputed fact": *Williams v. North Pacific Lum. Co.*, 42 Or. 153-160 (70 Pac. 387, 390). One of the chief purposes of the trial was to ascertain whether fraud tainted the execution of the instruments referred to in the quoted instruction, and the inquiry necessitated the determination of a question of fact which the jury alone was authorized to decide. The law neither raised nor declined to draw an inference from the transactions alluded to by the court, and it was error to advise the jury of the effect of particular acts which, because of

the nature of the controversy, constituted the cynosural facts, when there was evidence in the case which could rightfully be considered in the same relation: *Stanley v. Smith*, 15 Or. 505 (16 Pac. 174); *Patterson v. Hayden*, 17 Or. 238 (21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529); *Crossen v. Oliver*, 41 Or. 505 (69 Pac. 308); *Kellogg v. Ford*, 70 Or. 213 (139 Pac. 751); *Delovage v. Old Oregon Creamery Co.*, *post*, p. 430 (147 Pac. 392).

2, 3. The main question presented by the appeal hangs around the next assignment of error. The jury was told that knowledge acquired by an agent while transacting the business of his principal operates constructively as notice to the principal, but that such notice has no application when the agent acts for himself, in his own interest, and adversely to that of his principal; that although the company would ordinarily be charged with whatever notice or knowledge Custer had if he was president and manager and in full charge of the affairs of the Saratoga Investment Company, nevertheless if he so dealt with his company that he had an interest adverse to the corporation, then his knowledge would not be notice to the company, and if C. W. Kern dealt with Custer in such manner that the former knew, or by the exercise of reasonable diligence could have known, that Custer was dealing for himself and not as the agent of the company; and thereafter the court charged the jury as follows:

“You are instructed that if you find from the evidence that the defendant Paul W. Custer was the president of the plaintiff corporation, and as such president attended to practically all of its affairs and was the moving spirit of said corporation, and that in all of the dealings of the defendant C. W. Kern with

said Paul W. Custer he was acting in his capacity as president of the said corporation, the plaintiff corporation thereby acquired notice of all the acts and things done by said Paul W. Custer in the transaction of the purchase of said land by, through, and from the defendant C. W. Kern, and that in that event the plaintiff cannot complain of the acts of its president, and you should find in favor of the defendant C. W. Kern. In other words, if you find that Custer was acting as president, not in his individual capacity—that he was buying for the company in his official capacity—then you cannot find against Kern. If he was acting personally for himself, then it would charge the defendant Kern; if acting as president, and representative of the company, it would not charge the defendant Kern.”

While a charge to a jury should always be considered as a whole and never viewed hypercritically, still the quoted instruction as given may easily have misled the jury to believe that if Custer acted as the agent of the corporation, such circumstance alone and of itself would have warranted a verdict for the defendant Kern. The triers of the facts were unqualifiedly advised to find for Kern if Custer, in his dealings with the former acted as president of the corporation. If Kern agreed with Custer to accomplish the fraud charged in the complaint, then Kern would be liable regardless of whether Custer acted for himself or as the agent of the corporation. The doctrine of notice in all its phases, when applied to a principal who has been represented by an agent in a transaction with another, is designed to protect the innocent and not shield a wrongdoer; and the instruction should have been so qualified as adequately to inform the jury that if Kern conspired to defraud the plaintiff, then, in such event, the agency of Custer would be of no avail: *Mechem on Agency* (2 ed.), § 1826; 2 C. J. 871.

4. The errors already pointed out are such as to require a new trial, and on that account some notice should be taken of another feature of the case which was productive of much debate between counsel. The defendant argues that Custer was intrusted with the general management of the affairs of the company, and for all practical purposes was the corporation, that he was the sole representative of the company, and that therefore notice to him was notice to the corporation, even though Custer acted adversely to his principal or perpetrated an independent fraud upon it. The plaintiff asserts that the general rule, making notice to the agent notice to the principal, has its exceptions, one of which exists where the agent has an adverse interest, and another where he seeks to work a fraud upon the principal. The plaintiff insists that there are no qualifications or limitations placed upon the recognized exceptions to the general rule, and that therefore notice is not imputed to the corporation where the agent of such principal has an adverse interest, even though acting as the sole representative of the corporation. The rule of imputed notice, when considered with relation to the facts connected with the instant case, naturally presents itself in two aspects: (a) As applied to the business directly transacted between Custer and Kern; and (b) as applied to the delivery and acceptance of the deed from Custer to the Saratoga Investment Company. All the courts do not predicate the doctrine of constructive notice, in cases of agency, upon the same theory. In some jurisdictions the rule is made to depend upon the theory of identification whereby the agent is deemed to be the *alter ego* of the principal; and in this, as perhaps in the majority of jurisdictions, the same conclusion is reached by declaring that the agent is pre-

sumed to have performed his duty by communicating his knowledge to the principal: *Dight v. Chapman*, 44 Or. 265 (75 Pac. 585, 65 L. R. A. 793). Stated in broad terms the general rule is that:

"Notice to an officer or agent of a corporation, in due course of his employment, and in respect to a matter within the scope of his authority, or apparent authority, concerning affairs of such character that it becomes his duty to communicate the information to it, is notice to the corporation, whether he imparts to it such information or not": *Dillard v. Olalla Min. Co.*, 52 Or. 132 (94 Pac. 966, 96 Pac. 678); *Wood v. Rayburn*, 18 Or. 18 (22 Pac. 521); *Rayburn v. Davisson*, 22 Or. 246 (29 Pac. 738); *Hoffman v. Habighorst*, 49 Or. 386 (89 Pac. 952, 91 Pac. 20); *Pennoyer v. Willis*, 26 Or. 1 (36 Pac. 568, 46 Am. St. Rep. 594).

There is a marked divergence of judicial opinion upon the question of whether or not the previously acquired knowledge of the agent is imputable to the principal. In conformity with the present English rule and in harmony with the weight of judicial utterance, this court, speaking through Mr. Justice BURNETT, in *Oliver v. Grande Ronde Grain Co.*, 72 Or. 46 (142 Pac. 541), has approved the language found in *The Distilled Spirits*, 11 Wall. 356 (20 L. Ed. 167), and reading thus:

"The doctrine now seems to be established that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal

himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood."

See, also, *Farmers' Bank v. Saling*, 33 Or. 394 (54 Pac. 190); *Wood v. Rayburn*, 18 Or. 3, 18 (22 Pac. 521); *Rayburn v. Davisson*, 22 Or. 242, 246 (29 Pac. 738); *Pennoyer v. Willis*, 26 Or. 1, 8 (36 Pac. 568, 46 Am. St. Rep. 594). The exceptions making the rule of imputed notice unavailable are: (a) Where it is the duty of the agent not to disclose, as in the case of privileged communication; and (b) where the agent's relations to the subject matter are so adverse as to practically destroy the relationship, as when the agent is acting in his own interest and adversely to that of his principal, or is secretly engaged in attempting to accomplish a fraud which would be defeated by a disclosure to his principal: 2 Mechem on Agency (2 ed.), § 1813; 2 C. J. 869; *Dight v. Chapman*, 44 Or. 265 (75 Pac. 585, 65 L. R. A. 793).

A situation may be presented in a business transaction for a corporation, however, where the second exception mentioned may be nullified, thereby restoring the general rule in its entirety and with unimpaired vigor. If the officer of a corporation, although acting for himself or a third person, is at the same time the sole representative of such principal, and with full authority as such officer he alone transacts for the corporation some business, then the knowledge of the agent is imputed to the principal: *Weber v. Richardson*, 76 Or. 286 (147 Pac. 522); *McKenney v. Ellsworth*, 165 Cal. 326 (132 Pac. 75). Many authorities are collected and classified in a note to *Brookhouse v.*

Union Publishing Co., as reported in 2 L. R. A. (N. S.) 993. Professor Mechem sustains the rule by applying the doctrine of ratification, and says:

"The real ground upon which this situation rests is believed to be that already stated, namely, that where the agent is the sole representative of the corporation, the corporation cannot claim anything except through him, and that therefore if it claims through him, after notice of the facts, it must accept his agency with its attendant notice": 2 Mechem on Agency (2 ed.), § 1825.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Motion to dismiss appeal denied July 21, 1914.

Argued on the merits February 9, reversed March 2, rehearing denied May 25, 1915.

CENTRAL OREGON IRR. CO. v. WHITED.*

(142 Pac. 779; 146 Pac. 815.)

Appeal and Error—Record—Filing Transcript:

1. Under Section 554, L. O. L., as amended by Laws of 1913, page 618, providing that if a cause is one on appeal to the Supreme Court which the law requires to be submitted at Pendleton, the transcript and abstract shall be filed with the deputy clerk of the court at Pendleton, and Sections 896-898, L. O. L., providing that the clerk of the Supreme Court shall, with the consent of the court, appoint a deputy at Salem and one at Pendleton, and that the clerk shall attend each session at Pendleton unless excused by the court, the filing of the transcript with the clerk instead of the deputy clerk at Pendleton in a cause to be heard at Pendleton, is sufficient to give the Supreme Court jurisdiction.

*On the question of injunction against repeated trespass; see notes in 13 L. R. A. (N. S.) 173 and 21 L. R. A. (N. S.) 417. REPORTER.

ON THE MERITS.**Injunction—Continuing Trespass.**

2. Where a trespass is continued and made up of successive acts, and the threat and intention of continuing are manifest, equity will enjoin it on the ground that each separate trespass forms a separate cause of action and that it would be idle to require the plaintiff to bring a distinct action for each trespass.

[As to injunctions against trespasses on real estate, see note in 99 Am. St. Rep. 731.]

Waters and Watercourses—Reclamation and Irrigation—Contracts—Acreage of Irrigable Lands.

3. The Carey Act (Act Aug. 18, 1894, c. 301, 28 Stat. 378 [U. S. Comp. Stats. 1913, § 4686]), as amended, provides that, when a sufficient supply of water is actually furnished in a substantial ditch to reclaim a particular tract, patent shall issue therefor, and the rules of the Secretary of the Interior require that all irrigable land in each legal subdivision is to be thoroughly irrigated and reclaimed by the contract with the state and the rules made pursuant thereto. Under Section 4 of the Federal act and the acts supplementary thereto, and Act of February 24, 1909 (Laws 1909, p. 377), accepting it, the state, by its land board, contracted with plaintiff's predecessor to reclaim and irrigate land in accordance with plans filed with the state and made a part of the contract, which provided that the land should be thereafter examined, estimated and reported as a basis of reclamation liens, and plaintiff prepared a map listing the number of irrigable acres on each subdivision, the examination and report of which was approved by the state land board and furnished to the Secretary of the Interior for patent. Two tracts, in each of which the report showed 15 irrigable acres, though a more accurate subsequent topographical survey showed 25 and 26 acres, were released from lien with reference to the lands, etc., of the state's contract, and subject to the annual irrigation charge of one dollar per acre as fixed therein, by contract providing that plaintiff would supply water sufficient to irrigate each tract in the list for patent. *Held*, that defendant was entitled to water for only 30 acres, and that his breaking of plaintiff's gates to take more than sufficient therefor would be enjoined.

Costs on Appeal—Losing Party.

4. In a suit against defendant to enjoin him from breaking plaintiff's water-gates and taking more water than he was entitled to, where defendant's interest was but a small part of the matter involved, it would be inequitable for defendant suffering an adverse judgment to bear the costs.

From Crook: WILLIAM L. BRADSHAW, Judge.

In Banc. Statement PER CURIAM.

This is a motion to dismiss the appeal, for the reason that the transcript was not filed at Pendleton by the deputy clerk. The appeal is from Crook County,

and was filed by the clerk of this court on the 1st day of May, 1914, being within 30 days after the appeal was perfected.

MOTION DENIED.

For the motion, *Mr. Kirk Whited*, respondent, appeared in person.

Contra, Mr. Jesse Stearns and Mr. F. Ewing Martin.

Opinion PER CURIAM.

1. Section 554, L. O. L., as amended in 1913 (Laws 1913, p. 618), provides:

“Upon the appeal being perfected the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript * * if the cause is one on appeal to the Supreme Court, which it is provided by law or the rules of the court shall be submitted at Pendleton, the transcript and abstract shall be filed within the time and in the manner herein provided with the deputy clerk of the court at Pendleton,” etc.

By the law in effect at the time this act was passed appeals from Wasco, Crook and Sherman Counties, unless otherwise stipulated by the parties, were directed to be heard at the next succeeding term of said court, and the transcript was directed to be forwarded to the clerk there after the appeal was perfected. So this was a case to be heard at Pendleton. Sections 896, 897, 898, L. O. L., provide that the clerk shall, with the consent of the court, appoint a deputy at Salem and one at Pendleton, and that the clerk shall attend each session of the court at Pendleton, unless excused by the court. We conclude that the legislature did not intend to create the deputy clerk at Pen-

dleton an independent officer, or to give him powers denied his principal; neither can we believe there is any substantial difference in the words of the old law, that the transcript shall be forwarded to the clerk at Pendleton, and the words of the new law, that it shall be filed with the clerk at Pendleton. Therefore, we think the decision in *Pringle Falls Power Co. v. Patterson*, 65 Or. 474 (128 Pac. 820, 132 Pac. 527), is decisive of the motion. In that case we held, when an appellant, within the time limited gives the required notice of appeal, and files a transcript thereon with the clerk of the court, he has complied with the requirements of the statute, whether the copy of that record is left with that officer either at Salem or Pendleton, for when the transcript has been filed, jurisdiction of the cause has been secured, and our clerk can send the copy of the record to the proper place for trial, or the court can make an order to that effect.

The motion is denied.

DENIED.

Reversed March 2, 1915.

ON THE MERITS.

(146 Pac. 815.)

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit by the Central Oregon Irrigation Company, a corporation, against Kirk Whited, to restrain a threatened trespass, and involves the determination of the number of acres of land for which defendant is entitled to water for irrigation under a certain contract. The Circuit Court rendered a decree in favor of defendant, from which plaintiff appeals.

The construction of the defendant's water contract with the plaintiff company under the so-called Carey Act and the statute of Oregon accepting the same is involved in this case. The following transactions bear upon the question, the substance of which are alleged in the pleadings: On or about May 31, 1902, the Pilot Butte Development Company, a corporation organized under the laws of the State of Oregon, entered into a contract with the state land board under and pursuant to the provisions of Section 4 of the act of Congress approved August 18, 1894, and of the act of Congress supplemental thereto, commonly known as the Carey Act; and under and pursuant to the provisions of the act of the legislative assembly of the State of Oregon of February 24, 1909 (Laws 1909, p. 377), entitled "An act to provide for the acceptance by the State of Oregon of certain land, and for the reclamation and disposal of the same." This contract provided, among other things, for the construction, control and operation by the Pilot Butte Development Company of an irrigation system designed to reclaim certain arid lands situated in Crook County, Oregon, known as segregation list No. 6, embracing 84,707.74 acres of the public domain, according to the plans, surveys and estimates upon which the contract was based, and including the tracts of land in the defendant's possession hereinafter described. The agreement was assigned on March 14, 1904, by the Pilot Butte Development Company, with the consent of the state land board, to the Deschutes Irrigation & Power Company, a corporation, which succeeded to all the franchises, liens, rights, privileges and emoluments of the former company under the contract. The sum of \$848,557 was recited as the agreed amount to become due to the Pilot Butte Development Company for the reclama-

tion of the irrigable portion of the lands mentioned in the contract, as then estimated; and the sum of \$1 per acre for each irrigable acre of land for which water should be furnished for irrigation, pursuant to said contract, in each legal subdivision thereof, was established and agreed upon as the annual charge to be paid to the Pilot Butte Development Company for the maintenance of the irrigation system. It was further agreed that the development company, its successors or assigns, should have a lien upon the lands for the amounts due or to become due from the owners and occupants thereof for such annual maintenance charge and for interest thereon at the rate of 6 per cent per annum. About February 13, 1903, the state land board, acting for the State of Oregon, entered into a contract with the Secretary of the Interior, acting on behalf of the United States, for the segregation, irrigation, and reclamation of the public lands desert in character, described in the first-mentioned contract. This later agreement was duly made and based upon the plans, surveys and estimates submitted on behalf of the State of Oregon, pursuant to the provisions of the Carey Act, the amendments thereto, and the Oregon statute accepting the same as above referred to. It was duly recorded in the office of the clerk of Crook County on December 1, 1905. The development company and its assignee and successor in interest, the Deschutes Irrigation & Power Company, proceeded with the construction of the irrigation system mentioned and the reclamation of the land in accordance with the terms and provisions of the contract and with the plans, surveys and estimates theretofore made. As a result, a large part of the land, including the irrigable portions of the tracts in possession of the defendant, hereinafter described, was reclaimed by

water available for that purpose, furnished on and prior to February 26, 1906.

Rule 5 adopted by the company and approved by the state land board October 31, 1905, provided that:

“Persons in arrears for thirty days shall not be entitled to the use of water until such arrears are paid.”

Among the tracts of land reclaimed is the following, located in Crook County, Oregon:

“The southeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 19, township 15 south, range 13 east of Willamette Meridian, containing forty acres; and the southwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$ (being lot No. 2), of section 19, township 15 south, range 13 east of the Willamette Meridian, containing 38.83 acres.”

Of this land, according to the plans, surveys and estimates, 15 acres in each tract are irrigable under the irrigation system, and the annual charge and lien for maintenance is the sum of \$15 for each tract. About February 26, 1906, the defendant applied to purchase the first described tract, and entered into a contract with the Deschutes Irrigation & Power Company, dated on that day, whereby he agreed to pay the lien for the reclamation of the lands thereto apportioned by the state land board. He took the tract subject to the annual maintenance charge of \$1 per irrigable acre as provided in the contract between the State of Oregon and the Pilot Butte Development Company, and according to the plans, surveys, and estimates therefor, and subject to the rules and regulations aforesaid. On May 28, 1906, the defendant entered into another contract with the Deschutes Irrigation & Power Company for the right to acquire the second of the above-described tracts and also agreed to take it subject to the same terms and conditions.

Defendant had due notice of rule 5 of the rules and regulations, the same being printed upon the back of each of the contracts. In November, 1910, plaintiff purchased all the rights, franchises, liens, contracts and all other assets then owned by the Deschutes Irrigation & Power Company, including the right to collect the annual maintenance charges on the tracts of land in possession of the defendant, and plaintiff and its predecessors in interest have duly performed all the things mentioned in the contract with the state land board and the agreements with defendant to be performed by them.

The plaintiff alleges that about September 1, 1912, it closed and fastened the gates or laterals shutting off water from the defendant's land, pursuant to rule 5, the defendant being in arrears in the payment of his maintenance charges for more than 30 days; that he wrongfully broke down and opened the gates, took the water from the ditch, and threatens to continue in such trespass to the plaintiff's damage. Defendant admits that he broke the gates and took out the water for irrigating his lands. He pleads that he does not mean to interfere with the same unless plaintiff shall fail to furnish water for his lands according to its contracts not exceeding sufficient water for 26 acres on one of the tracts and 25 on the other. Defendant also admits the execution of the several contracts mentioned, but denies that the same were based upon or were to be performed according to the "plans, surveys and estimates" referred to in the complaint. He denies that the plaintiff has performed the conditions of the agreements, and for an affirmative defense pleads his contracts with the plaintiff's predecessor, copies of which are attached to the complaint. That part

which is deemed pertinent to this inquiry recites as follows:

"Now, therefore, I * * hereby apply to said party of the second part for all of the southeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 19, township 15 south, range 13 east of Willamette Meridian, Crook County, State of Oregon, containing 40 acres, and for release of a lien, thereon owned and held by said second party for the reclamation thereof, which said lien was created by the terms of said contract, between said state land board and said Pilot Butte Development Company, and by it assigned to the second party herein. In consideration whereof, and of the delivery of possession of said land to me or my qualified assigns prior to date of reclamation of the amounts herein agreed to be paid, I promise and agree, for myself, my heirs, executors, administrators and assigns, to pay the sum of \$244.00, it being the amount of the lien due said second party for reclamation as fixed by said contract with the State of Oregon. * * "

Here follow stipulations for four annual payments with interest as per promissory notes, for the assignment of the application and agreement and the proceedings in the event of such assignment, and for the procedure in case of default in payments. Then the following appears:

"The second party agrees, in consideration of the terms and agreements of the first party and upon the payment of the reclamation lien above mentioned, in accordance with the terms and conditions herein expressed, to release said reclamation lien on the land above described and authorize the state land board of the State of Oregon to deed to the first party the above-described tract free from the reclamation lien thereon held by the second party; and subject to the annual maintenance charge of one dollar per acre, mentioned in the contract between the State of Oregon and the second party herein."

Defendant further alleges that, at the time he entered into the contracts, he relied upon rules Nos. 1, 2 and 3, printed upon the backs thereof, the substance of which is as follows:

(1) "The Deschutes Irrigation & Power Company, its successors or assigns, * * shall be required to furnish a supply of water for each tract in the lists for patent, sufficient to thoroughly irrigate and reclaim it and to prepare it to raise ordinary agricultural crops."

Rule 2 fixes the time of the irrigation season and provides that:

"The company shall deliver to each settler * * owning lands reclaimed by contract with the State of Oregon * * an amount of water measured at the point of delivery to his land, which will cover each acre of irrigable land to a depth of 1.8 feet"—

with a provision that the supply may be changed according to needs with the approval of the state land board.

Rule 3 states:

"Water shall be delivered to the lands of each settler at the highest practicable point or points which can be reached by a gravity flow, which point or points are best adapted to reclaim all the irrigable lands owned by such settler. Said point or points of delivery shall be ascertained and determined by the chief engineer of the company, and in case of dispute between the chief engineer of the company and the settler as to the point of delivery the question shall be submitted to the state engineer whose decision shall be final."

It is alleged by the defendant that there is in excess of 26 acres of irrigable land upon the tract described in his first contract and more than 25 acres upon that embraced in his second agreement. It appears that during the year 1907 the Deschutes Irrigation & Power

Company received \$26 as an annual maintenance charge on one of defendant's contracts and \$25 on the other at \$1 per acre, since which time, except when the dispute arose, the defendant has paid \$15 for each tract; that afterward the company credited the amount in excess of \$1 per acre for 15 acres in each tract for the year 1907. The evidence shows that one of the gates was repaired three times and then allowed to remain open during the irrigation season of 1912. Upon this point the defendant testified to the effect that, if the company refused to recognize his right to water for 25 acres and 26 acres on the respective tracts and closed his gates, he would probably break them open again. He stated: "You shut them off again, and I will break them open again and take it." He also testified that the reason for breaking the gates was that he was entitled to water for the above-mentioned acres on the respective tracts; that he was trying to bring the matter to an issue and challenged suit.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. Jesse Stearns* and *Mr. F. Ewing Martin*, with an oral argument by *Mr. Stearns*.

Mr. Kirk Whited submitted a brief for respondent.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It appears from the record that there is a real controversy between the parties, and that there has been an alleged trespass which is threatened to be continued under the same circumstances. In brief, if the contention of the plaintiff as to the rights under the contracts referred to are correct, then the acts of the defendant were wrongful and should be restrained.

If the contentions of the defendant in this respect are maintained, then a decree should be rendered in his favor.

2. The authorities establish the doctrine that where a trespass is continued, made up of successive acts, and the threat and intention of continuing are manifest, equity will enjoin the same, for the reason that each separate trespass forms a separate cause of action, and it would be idle to require the plaintiff to bring a distinct action for one of the small trespasses: *Chapman v. Dean*, 58 Or. 475 (115 Pac. 154); *Micelli v. Andrus*, 61 Or. 78, 89 (120 Pac. 737); *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38 (39 Pac. 399). 1 'High on Injunctions (4 ed.), Section 702a, states the rule as follows:

"It is held that where the acts of trespass are constantly recurring, but the injury resulting from each separate act is trifling, so that the damages recoverable for each act would be very small when compared with the expense necessary to prosecute separate actions at law therefor, relief will be granted owing to the inadequacy of the legal remedy."

3. The express acreage question under contracts of the kind named is involved in the case at bar. It is of importance to the various settlers upon such projects, where there is a dispute as to the number of irrigable acres.

Rule 1 printed on the back of the contract of the defendant for a release of the lien, and to all intents and purposes made a part thereof, in effect provides that the company "shall be required to furnish a supply of water for each tract in the lists for patent, sufficient to thoroughly irrigate and reclaim it and to prepare it to raise ordinary agricultural crops." Rule 2 fixes the time of irrigation and provides that

the company shall deliver to each settler an amount of water measured at the point of delivery to his land which will cover each acre of irrigable land to a depth of 1.8 feet. The number of irrigable acres must therefore be determined. This is not given in the contract between the company and the settler, which is based upon and made for the purpose of carrying out, or as an extension of, the plan provided for in the contract between the company and the state under the provision of the Carey Act and the statute of the state.

Turning to the contract between the company and the State of Oregon (Plaintiff's Exhibit "F," p. 2), we find that the company agrees, among other things, as follows:

"To build and construct a system of irrigation substantially according to the plans submitted by it with its application for this contract, now on file with the state land board, which said plans are hereby referred to and by reference made a part of this contract; to furnish an ample supply of water, substantially in accordance with said plans to reclaim the lands hereinafter described and set out herein, in compliance with the acts of Congress granting the same to the state."

The following also appears:

"It is further mutually understood and agreed that of the lien hereinbefore created upon lands reclaimed for cost of reclamation each smallest legal subdivision shall bear such proportion as the true value of the subdivision bears to the value of the whole tract subject to the lien, and that, for mutual convenience, as soon hereafter as the land can be examined and the value thereof estimated and reported upon and the report approved in writing and the lien apportioned and designated by the state land board, the amount of the lien against such respective tract, as so designated, shall be fixed and determined, and not thereafter subject to change, except by mutual consent."

We must resort to this contract in solving the question.

An estimate of the number of acres susceptible of irrigation on each legal subdivision of the land was prepared and listed by the company and the number indicated on the map. The lands were examined with much care by A. E. Hammond, a civil engineer appointed by the state land board, who fixed the relative value of each 40 acres in the list, and apportioned the same as a lien thereon held by the company for the cost of reclamation. His report to the state land board was made June 2, 1904. It showed that the prices were "based entirely upon the character of the soil and the amount of tillable (or irrigable) pasture and waste land in each forty-acre piece." This report was approved by the board, and the amount of the lien against each smallest legal subdivision fixed and determined as recommended. This list was furnished the Department of the Interior for patents. The list (Plaintiff's Exhibit "I") comprises about 36 pages of typewritten matter. That portion referring to defendant's lands is as follows:

Parts of Sections.	Sec.	T.	R.	Area.	Irrigable land.	Waste land.	Price per acre.	Total value.
Lot 2	19	15 S.	13 E.	38.83	15.00	23.83	9.00	349.50
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$				40.00	15.00	25.00	6.10	244.00

A more accurate topographical survey of the land made subsequently showed defendant's tracts of land to contain 25 and 26 acres susceptible of irrigation,

and defendant's measurement thereof makes the same 27 acres and a fraction in each tract. It is contended by the defendant that, notwithstanding the number of acres specified in the list as irrigable land, he is entitled to water for all that part of his land that can be irrigated by the gravity system without further payment in connection with the construction of the works. This he claims by virtue of the general clause in the Carey Act (U. S. Comp. Stats. 1913, § 4686), reading as follows:

"And when an ample supply of water is actually furnished in a substantial ditch or canal to reclaim a particular tract, then patent shall issue for the same."

Also, by virtue of the requirement of the rules of the Secretary of the Interior that all the irrigable land in each legal subdivision is to be thoroughly irrigated and reclaimed, by the contract with the state, and by the rules promulgated pursuant thereto. The area of land in each tract which is susceptible of irrigation from the nature of things is an indefinite quantity varying where the land is undulating according to the amount of labor bestowed thereon in leveling the same. The amount thereof is subject to ascertainment. In order to fix the dimensions and estimate the cost of construction of the irrigation system for the reclamation of these lands, and in accordance with the provisions of the contract between the company and the state upon which defendant's rights are based, the number of irrigable acres in each tract of defendant was determined to be 15. This was by an estimate. An exact topographical survey would, no doubt, have entailed an expenditure of many thousands of dollars. This determination was approved by the land board and also by the Department of the In-

terior, as we understand. It was acted upon by the company in the construction of the canals and works and in making the appropriation of the water necessary therefor. The application and agreement for the land and acceptance of a conveyance of the same were founded thereon. It is claimed that there are 3,400 acres of like excess acreage. The arrangement made cannot be disturbed without encroaching upon or at least menacing the rights of other water users. It may be that, after a large portion of the segregation has been irrigated for a time, a less amount of water will be required therefor, and an equitable allotment can be made so as to serve the land in dispute. In the present condition of the contracts and interests involved, the number of acres of irrigable land for which the defendant is entitled to water under the contract and the statute must be limited to 15 acres of each subdivision.

According to the letter and spirit of the enactments referred to and the contracts entered into in conformity therewith, the water users in the end pay for the construction of the irrigation system, and each subdivision should bear its proportionate share of the burden as nearly as practicable according to its value. The area of irrigable land is the chief factor in regulating the value of a tract. If the water users are entitled to water for the excess acreage over and above the number of acres contained in the list for which the works were constructed, then the plaintiff company may demand and collect \$1 per acre as an annual maintenance fee for all the excess acreage. The lien on many of the forties, all of which could be irrigated, was fixed at \$14.75. After a large number of acres had been applied for on November 16, 1906, the amount of the lien per acre on the remainder was

changed by a supplemental contract with the state. As we view the matter, a readjustment can only be made by agreement of the parties with the approval of the state land board. Stated in brief, the defendant's agreement has for its foundation the contract with the state. The list is made a part of the latter by virtue of the stipulations therein. All were given force by the statutes under which they were executed and carried out. The reclamation of a particular tract of land under the Carey Act sufficient for the issuance of patent therefor, viewed in the light of the older desert land law of March 3, 1877, means to reclaim all of such land that is susceptible of irrigation. This area, being indefinite, must of necessity be ascertained from the contracts and fixed as above indicated. The defendant should be inhibited from interfering with the gates named for the purpose of using more water than sufficient to irrigate 30 acres of his land according to the contract. It follows that the decree of the lower court must be reversed and one entered in accordance herewith.

4. In view of the fact that this is a suit to adjust a matter in which defendant's interest is but a small part, it would be inequitable for him to bear the burden of costs; therefore neither party should recover costs. And it is so ordered.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and
MR. JUSTICE BENSON CONCUR.

Argued March 19, affirmed April 6, rehearing denied May 25, 1915.

BANK OF GRESHAM v. WALCH.

(147 Pac. 534.)

Bills and Notes—Failure of Consideration—Statute.

1. In an action by a bank on a note, of which it was the original payee, given for the purchase price of stock, where the sale had been effected by agents acting for the bank and for the corporation whose stock was sold, they having represented that the corporation was a rich concern and backed by the bank, and that it had a large amount of goods in warehouse when it had, in fact, no property, money, or credit, a good defense was presented to the bank's suit; it not being a holder in due course, under Section 5885, L. O. L., defining who is a holder in due course, and absence or failure of consideration being a matter of defense against any person not a holder in due course by direct provision of Section 5861.

Bills and Notes—Want of Consideration—Burden of Proof.

2. By the negotiable instruments law the burden of showing want of consideration rests upon the defendant sued on a note, and, if he offers any evidence on the head, the plaintiff must show consideration by a fair preponderance of the evidence.

Principal and Agent—Ratification—Acceptance of Benefits—Estoppel to Deny Authority.

3. In an action on a note for the purchase price of stock, where the plaintiff received such note, and thereby accepted the benefits of the transaction from its agents, who had secured it from the defendant, it became chargeable with the fraud of such agents in procuring the note.

Evidence—Action by Bank—Letter of Cashier.

4. In a suit by a bank on a note, a letter written by its cashier on its stationery and signed by him in his official capacity was admissible in evidence, on the issue of fraud set up by the defense, as being the letter of the bank.

Trial—Conduct of Judge—Remarks in Ruling.

5. In an action by a bank on a note given for stock, the defense was the false representations of the agents of the bank and the corporation whose stock was sold as to the resources of the company, and, in ruling on the admissibility of a letter of the cashier of the bank, the court stated: "It will be a question for the jury to determine whether these parties were acting in conspiracy to work out this fraud." *Held*, that the reference to "this fraud" was not objectionable as a reference to fraud by plaintiff; there being no question but what there was fraud on the part of the corporation.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE BEAN.

This is an action brought by the Bank of Gresham against L. Walch to recover the sum of \$750, balance due upon the principal of a promissory note dated July 13, 1912, for \$1,000, with interest and attorney's fees. To this complaint defendant interposed the defense of fraud, and, as a basis thereof, alleges the existence of a conspiracy between the plaintiff and the Co-operative Supply House. The details of the transaction are set forth in the answer, in substance, as follows:

That on or about June 22, 1912, the plaintiff corporation, represented by John G. Sleret, its president, F. A. Holliday, its vice-president, and O. A. Eastman, its cashier, and the Co-operative Supply House, a corporation, by George J. Hodder, its president, and P. J. Darche, its secretary, and both corporations and their respective officers represented by Englert & Hardley, who were selling agents of the Co-operative Supply House, agreed and confederated and acted together for the purpose of cheating and defrauding the defendant.

That before the defendant purchased some of the capital stock of the Co-operative Supply House the officers and agents of the two corporations named above caused to be prepared and written to show and read to the public for the purpose of inducing people in general to invest in the capital stock of the Co-operative Supply House a large number of letters signed by the officers of the plaintiff and other influential business men residing near Gresham, said letters to be delivered by the officers of the respective corporations to Englert & Hardley, their agents employed to solicit subscriptions to the capital stock of the Supply House

to be used in selling such stock; that Englert & Hardley were authorized and directed by the plaintiff corporation and the Co-operative Supply House, and the officers thereof, to exhibit and read said letters to the defendant, to the end that the latter might believe the statements therein contained, and thereby be induced to purchase and pay for some of said corporate stock.

That the following is a copy of one of the letters written by one O. A. Eastman, cashier of the plaintiff corporation:

“Bank of Gresham, Gresham, Oregon.

“John G. Sleret, Pres.

“F. A. Holliday, Vice-pres.

“O. A. Eastman, Cashier.

“Emil G. Kardell, Asst. Cashier.

“June 22, 1912.

“Co-operative Supply House, Portland, Oregon:

“Gentlemen: In reply to your request as to my opinion of the future possibilities of the Co-operative Supply House, would say I cannot see any reason why it should not prove a success and profitable investment owing to to fact that there is no concern of any prominence on the coast doing a mail order business.

“Previous to my coming West my attention was called to the remarkable success of the firm of Sears, Roebuck & Co., and I cannot see why under your plan of distributing stock among the people with a view of obtaining them as customers will not prove most profitable both to your company and the stockholders. As in evidence of my belief I have this day signed a subscription for a substantial block of stock through your representative Messrs. Englert & Hardley and predict a successful future for the company, as the business will be in the hands of capable men.

“Yours truly,

“O. A. EASTMAN, Cashier.”

That Englert & Hardley, agents of such corporations, and acting under their authority and direction, and with their full knowledge and assent, and for the purpose of inducing the defendant to purchase capital stock of the Supply House with the intent that he would rely upon and believe to be true the statements and representations contained in said letters, did on July 13th call at the home of defendant, and found him ill and suffering from kidney trouble and partial blindness, and, while in such condition, the said Englert & Hardley read to and showed defendant the original of the letter above mentioned, and a large lot of other letters of similar import and effect, and stated to defendant the following representations:

“(1) The Co-operative Supply House is a corporation organized with a capital stock of \$3,000,000.

“(2) This is a rich concern, and it is backed by the Bank of Gresham, Oregon, which owns a large block of stock.

“(3) This stock is now worth \$10 per share, and it will go to \$15 per share next month, and this is the time for you to buy.

“(4) This company now has thousands of dollars worth of goods in its big warehouse in Portland, ready for distribution to the farmers, and if you become a stockholder now you will be entitled to buy goods from this company at extremely low rates.

“(5) In addition to getting goods at low rates you will also receive large yearly dividends on your stock.

“(6) If you want to buy this stock, and have no money to pay for it now, the Bank of Gresham will take your note and issue you the stock.”

That defendant relied upon all the foregoing statements and representations, and, believing them to be true, was induced to, and did, purchase capital stock of such corporation of the par value of \$1,000 for the

price of \$1,000, and in payment therefor gave to plaintiff his negotiable promissory note for the sum of \$1,000, although defendant thought at the time that he was purchasing only \$100 worth of said stock for the price of \$100; that the stock was the only consideration received by the defendant.

That all the aforesaid statements and representations were false and untrue, and known by the corporations and their officers and agents to be false when the same were made, or were made recklessly and wantonly and without knowledge that the same were true; that said stock was worthless, and that the Co-operative Supply House had no property, money or credit whatever.

That as soon as the defendant was notified of the note held by the bank, which was the first that he knew of the note being for \$1,000, he informed plaintiff of the fraud practiced upon him; that O. A. Eastman, cashier, informed defendant that his \$1,000 note would be surrendered to him as soon as the matter could be arranged with the Co-operative Supply House, or that, if he made arrangements to purchase a smaller block of stock, the difference between the value of the stock he then had and his new purchase would be indorsed upon the \$1,000 note; that defendant believed and relied upon the statements of said plaintiff made by its cashier, and thereafter, on January 22, 1913, plaintiff and the Co-operative Supply House through its officers, in furtherance of their scheme and design to defraud this defendant, again issued to him two blocks of stock in the Co-operative Supply House, one for 25 shares, delivered to defendant, and one for 75, delivered to plaintiff; that in November, 1912, O. A. Eastman induced defendant to pay \$250 on the note mentioned in plaintiff's complaint; and that defendant

paid the same with the understanding that he would be released from any further payments on the \$1,000 note. By a further and separate answer defendant alleges that he has been damaged in the sum of \$250. To this answer plaintiff replied that defendant at a date prior to July 13th had subscribed for stock in the Co-operative Supply House, and had given his note for \$1,000 payable at another bank, but that by agreement with defendant, and at a subsequent date, he gave a second note for \$1,000 to plaintiff, upon which plaintiff advanced the money necessary to take up and pay off the note given by the defendant to the Co-operative Supply House. The cause was tried to the court and jury, and a verdict rendered in favor of defendant for \$250. From a resulting judgment the plaintiff appeals. In his evidence the defendant tells his story, in substance, the same as in his answer.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Stapleton & Sleight*, with an oral argument by *Mr. George W. Stapleton*.

For respondent there was a brief over the names of *Mr. Walter G. Hayes* and *Messrs. Huntington & Wilson*, with an oral argument by *Mr. Hayes*.

MR. JUSTICE BEAN delivered the opinion of the court.

1, 2. Counsel for plaintiff objected and excepted to the introduction of any evidence in support of the allegations of defendant's answer, for the reason that the same did not state facts sufficient to constitute a defense of fraud. With this contention we are unable to agree. The knowingly false and written representations made to defendant for the purpose of induc-

ing him to purchase the worthless stock and execute the note upon which defendant relied as set forth in the answer were sufficient to permeate the whole transaction and vitiate the same. It was stated to defendant in writing that the Co-operative Supply House was a rich concern backed by the Bank of Gresham, the first of which was clearly false, and the latter denied by plaintiff. It was represented that the company had thousands of dollars worth of goods in its warehouse in Portland, when, in truth, it had no property, money or credit. That the representations were made by Englert & Hardley, as agents for the Supply House and plaintiff, with intent to defraud defendant, is plainly alleged: *Anderson v. Adams*, 43 Or-621, 627 (74 Pac. 215); *McFarland v. Carlsbad Hot Springs S. Co.*, 68 Or. 530 (Ann. Cas. 1915C, 555, 137 Pac. 210); *Nevada Bank of San Francisco v. Portland National Bank* (C. C.), 59 Fed. 338.

In order to determine the effect of the fraudulent transaction upon the note given by defendant to the plaintiff bank, it is necessary to consider our negotiable instruments law. Under the express terms of the statute every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; but, under that rule and further provisions, such an instrument is open to the defense of want of consideration or fraud as against all persons except a holder in due course: 1 Daniel, Neg. Inst. (6 ed.), § 163. Section 5885, L. O. L., declares:

“A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith

and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The plaintiff bank is the original payee named in the note sued on. It has never been indorsed or transferred. Plaintiff is not a holder thereof in due course within the meaning of the statute. The note is subject to the defense stated in the answer. Under the statute the burden of showing that there was a want of consideration rests upon the defendant, and, if he offers any evidence that shows or tends to show a want of consideration, then it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence upon the whole case that there was a consideration: *Bringman v. Von Glahn*, 71 App. Div. 537 (75 N. Y. Supp. 845). Absence or failure of consideration is a matter of defense as against any person not a holder in due course, as ordained by Section 5861, L. O. L. The evidence tended to support the allegations of the answer, and to show, and the jury by its verdict found, that the note was obtained from defendant by means of false and fraudulent representations made by Englert & Hardley, and for no consideration except the worthless certificates of stock in the Co-operative Supply House.

3. When the Bank of Gresham received the note from Englert & Hardley, and thereby accepted the benefit of the transaction, it was incumbent upon the bank to pay to defendant the consideration for the note which it received or to satisfy itself that he had been paid, and that the note was valid. If plaintiff was content to trust to Englert & Hardley to transact the business for it, this would not relieve the payee in the note from being subject to the defense available to the maker in an action between the original parties to the

note. The fact that a prior note was executed payable to or at another bank where defendant usually did business, and was destroyed, does not strengthen plaintiff's claim; but this circumstance was one that should have tended to put plaintiff upon its guard, if notice had been necessary.

4, 5. Our conclusion as to the status of the parties to the note under the statute renders the other question raised and ably briefed by the learned counsel for plaintiff of less importance. By the charge of the trial court the case was submitted to the jury upon the theory that, in order for the fraud to constitute a defense to the note, the plaintiff must be proven to have been connected therewith, or had knowledge or means of knowledge thereof in addition to the taking of the note from the defendant. This theory of the case was favorable to the plaintiff, and it has no reason to complain of the instructions in this regard. The court charged the jury, in effect, that the letter set out in the answer was the letter of the bank. Under the authority of *Nevada Bank of San Francisco v. Portland Nat. Bank* (C. C.), 59 Fed. 338, there was no error in so ruling: *Morse, Banking*, § 162. The writing of the letter by Mr. Eastman, the plaintiff's cashier, was not disputed. In ruling upon the objection to introduction of letter, defendant's "Exhibit A" the court said:

"It will be a question for the jury to determine whether these parties understood each other and were acting in conspiracy and concert for the purpose of working out this fraud. If the jury shall find that there was an understanding between Mr. Eastman and this other man by which this work was being done, then the declaration made by this man is introducible against the bank as the cashier is the manager of the bank, and not a subordinate."

As we understand the records, there was no room for question but that there was fraud on the part of the Co-operative Supply House and its agents, and therefore the remark of the court was not objectionable. The court did not refer to the fraud as being that of plaintiff, and its rights were not prejudiced thereby.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON CONCUR.

Argued March 18, affirmed April 6, rehearing denied May 25, 1915.

WINDSOR v. MOURER.

(147 Pac. 533; 147 Pac. 1190.)

Judgment—Satisfaction—Notice of Assignment.

1. Where a judgment debtor, at the time he procured satisfaction of the judgment to be noted on the margin of the proper record by the judgment creditor's attorney in consideration of payment by him, had no notice that the judgment creditor had assigned the judgment, the court properly refused to vacate the cancellation of the judgment at the instance of the assignee.

[As to assignment of judgments, see notes in 54 Am. Dec. 366; 78 Am. St. Rep. 47.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

These two suits instituted by J. C. Windsor against George C. Mourer and others, to vacate and set aside the cancellation of judgments, were consolidated and

tried, and, the relief prayed for in the complaint having been denied, the plaintiff appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. George F. Hopkins, Jr., Mr. A. King Wilson* and *Messrs. Seitz & Clark*, with oral arguments by *Mr. Hopkins* and *Mr. Wilson*.

For respondents there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. Arthur L. Veazie*.

Opinion by MR. CHIEF JUSTICE MOORE.

The evidence shows that on August 29, 1910, J. N. Windsor, the father of J. C. Windsor, the plaintiff herein was the owner of 1,473 shares of the capital stock of the Campbell Automatic Safety Gas Burner Company, a corporation, and on that day he entered into a written contract with the defendants herein, George C. Mourer, L. C. Hammer, H. G. Luker, Edward Holloway, John E. Murphy and H. G. Sonneman and others, whereby he stipulated to assign and transfer such stock to the persons named, in consideration of \$14,730, evidenced by their promissory note of \$5,000 and \$8,980, maturing in six and nine months, respectively, the remainder being made up of like promissory notes of \$125 each, the first maturing October 1, 1910, and another each succeeding month. All were payable to the order of J. N. Windsor, with interest from date at the rate of 6 per cent per annum, and it was provided in each note that, in case suit or action should be instituted thereon, the makers would pay such additional sum as the court might adjudge reasonable as attorney's fees. The payee named in the notes stipulated in

the written contract, as a part of the consideration therefor, that he would not negotiate, assign or pledge the note for \$8,980 until it became due. Disregarding that agreement, J. N. Windsor, on October 28, 1910, indorsed that note without recourse to E. R. Rose, who in like manner, on November 23, 1910, transferred the negotiable instrument to his mother, Mrs. Clara A. Campbell, to whom all the other notes were also assigned. A suit was instituted by the makers of the larger note against the original payee thereof to enjoin its transfer, but when it was discovered that the negotiable instrument had already been assigned, as here indicated, the suit was dismissed.

Mrs. Campbell commenced an action in the Circuit Court of the State of Oregon for Multnomah County against the makers of the promissory notes to recover the amounts of four thereof, each for \$125, and the \$5,000 note, and on November 20, 1911, she secured a judgment for \$5,351.75, the remainder due, with interest at the rate of 6 per cent per annum from August 29, 1910, until paid, \$350 as attorney's fees, and the costs and disbursements. All the makers of these notes, except Holloway, were regularly adjudged bankrupts November 18, 1911, by the District Court of the United States for the District of Oregon, and thereafter A. A. Cunningham was appointed and duly qualified as trustee of their estates: *Hammer v. Campbell Automatic Safety Gas Burner Co.*, 74 Or. 126 (144 Pac. 396).

Mrs. Campbell also commenced an action in the same court against the makers of the notes to recover the amount due on the larger negotiable instrument, and, having secured a writ of attachment, she caused it to be levied upon the property of the defendant Holloway, and, in order to secure a discharge of the seiz-

ure, he and the defendants herein F. C. Dillingham and H. A. Lewis executed and filed in that court an undertaking whereby they jointly and severally agreed to pay her the amount of any judgment that she might obtain in that action. That cause having been tried, Mrs. Campbell, on May 20, 1912, secured a verdict for \$8,980, with interest from August 29, 1910, at the rate of 6 per cent per annum. Judgment was rendered on the verdict against the makers of the note and the sureties on the undertaking for a release of the attachment for that sum, and interest, \$600 attorney's fees, and the costs and disbursements of the action.

From the first judgment referred to the makers of the notes jointly appealed, and from the second judgment Holloway alone appealed; the defendants herein, Henry Hagelstein, C. E. Belding and E. W. Oliver, being sureties on the undertakings for appeal. Though these appeals have been perfected, they remain undetermined by this court. Mrs. Campbell, on August 16, 1912, by writing transferred to J. C. Windsor, the plaintiff herein, all her right, title, and interest in and to both of the judgments, but the assignment was never recorded. In consideration of \$6,750 paid by Holloway, there was noted on the margins of the proper records of Multnomah County, Oregon, respective entries as follows:

"Full satisfaction of the within judgment is hereby acknowledged this 28th day of March, 1913. [Signed] A. B. Foley, Attorney in Fact for C. A. Campbell, Plaintiff. Attest: John B. Coffey, Clerk of Circuit Court, by C. J. Strode, Deputy."

The chief inquiry to be considered is whether or not the defendant Edward Holloway had notice of Mrs. Campbell's assignment of the judgment to the plaintiff when he secured and had recorded the satisfactions

which have been referred to. An examination of the voluminous transcript of testimony convinces us that the trial court properly concluded that Holloway did not have such notice. No good purpose can be subserved by setting forth the testimony of the plaintiff and his witnesses on this branch of the case. It is sufficient to say that their sworn declarations are so contradictory and in many particulars so improbable as to render their testimony unworthy of credence.

The decree should therefore be affirmed, and it is so ordered. **AFFIRMED. REHEARING DENIED.**

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE McBRIDE concur.

Denied May 25, 1915.

ON PETITION FOR REHEARING.

(147 Pac. 1190.)

Messrs. Wilson, Neal & Rossman, for the petition.

Messrs. Veazie, McCourt & Veazie, contra.

Department 1. Opinion by **MR. CHIEF JUSTICE MOORE.**

In the former opinion it is said: "Mrs. Campbell on August 16, 1912, by writing, transferred to J. C. Windsor, the plaintiff herein, all her right, title, and interest in and to both of the judgments, but the assignment was never recorded." From the concluding part of that sentence the following additional words were inadvertently omitted, to wit: "Until after the record of these judgments was discharged." In a petition for a

rehearing it is insisted that, the assignment having been duly recorded, a different conclusion should have been reached. It will be seen from an examination of the original opinion that the affirmance of the decree is predicated upon Holloway's want of notice of such assignment when he secured a satisfaction of the judgments. That the assignment was subsequently recorded is unimportant.

We think the conclusion reached in this case is warranted by a consideration of the evidence, and hence the petition for a rehearing is denied.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Argued March 4, affirmed March 30, rehearing denied May 25, 1915.

WEBER v. RICHARDSON.*

(147 Pac. 522; 147 Pac. 1199.)

Appeal and Error—Findings—Conclusiveness.

1. A finding on conflicting testimony of witnesses appearing before and personally known to the court will not be disturbed on appeal.

Vendor and Purchaser—Bona Fide Purchaser—Notice—Instrument not Entitled to Record.

2. The recording of a contract neither sealed, witnessed, nor acknowledged does not impart notice.

[As to effect of recorded instrument not entitled to record, see note in Ann. Cas. 1913B, 1070.]

Trusts—Declaration of Trust—Failure to Give Notice of Trust.

3. Where a purchaser, to procure money to pay on the contract, made a contract with a third person to advance money, and agreed to secure the title to the land and hold one half for the third person and execute a declaration of trust, but the purchaser never legally

*As to how far corporation is charged with knowledge of managing officer engaged in illegal act, see note in 2 L. R. A. (N. S.) 993.

recognized the third person's interest, the third person was not negligent for failure to give notice of the trust charged on the land.

Corporations—Notice to Officers—Effect.

4. The rule that notice to the president of a corporation is notice to it does not apply when the officer acts for himself and adversely to the corporation, in which case his knowledge is not imputed to the corporation.

[As to notice to officer as notice to corporation, see note in Ann. Cas. 1915A, 855.]

Trusts—Enforcement—Evidence.

5. A purchaser of real estate, to procure money to make payments under the contract, contracted with a third person to advance money, and agreed to take title in his own name, but to hold one half of the real estate for the third person and execute a declaration of trust. The purchaser organized a corporation, and it acquired title to all the real estate and the purchaser, who was an officer, obtained stock in the corporation. The stock was transferred to another stockholder without consideration. *Held* that, though it be assumed that the corporation had no knowledge of the contract between the purchaser and the third person whereby a trust was to be charged on the land in favor of the third person, the stock was in equity impressed with a trust in favor of the third person to the amount of his equitable interest.

Fraudulent Conveyances—Consideration—Burden of Proof.

6. Where a transfer of property is alleged to have been fraudulent as against creditors of the transferor, the transferee has the burden of proving payment of consideration to show that he was an innocent purchaser.

Trusts—Enforcement—Decree.

7. A decree which adjudges that, on payment by defendant to plaintiff of a specified sum, real estate described shall be discharged from a trust in favor of plaintiff, but if the payment is not made plaintiff shall have a lien on the property as security, must fix a time within which payment shall be made.

Trusts—Enforcement—Decree.

8. A decree which adjudges that, on payment by defendant to plaintiff of a specified sum, certain real estate shall be discharged from a trust in favor of plaintiff, but on a failure to pay plaintiff shall have a lien as security for the payment of the amount, must provide that plaintiff, on receiving payment or taking title, shall convey to defendant an interest in other real estate which had been conveyed to him as security.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Joseph Weber and Frank I. Weber against A. B. Richardson, the Richardson Investment

Company, a corporation, and John P. Sharkey, for an accounting and to impress a lien on real property. From a decree for the plaintiffs as prayed for, the defendants Richardson and the corporation appeal.

MODIFIED AND AFFIRMED.

FURTHER MODIFIED AND REHEARING DENIED.

For appellants there was a brief over the name of *Messrs. Griffith, Leiter & Allen*, with an oral argument by *Mr. Rufus A. Leiter*.

For respondents there was a brief over the name of *Messrs. Reed & Bell*, with an oral argument by *Mr. Sanderson Reed*.

Opinion by MR. CHIEF JUSTICE MOORE.

The evidence shows that a contract was made July 20, 1908, whereby Ellis G. Hughes engaged, upon the payment of a stipulated consideration, to sell and convey to the defendant Sharkey certain real property in Waverly, a suburb of Portland, Oregon. Mr. Hughes died testate August 27, 1909, leaving as his sole heirs at law Maria L. Hughes, his widow, and Mrs. Louise J. Martin, a daughter. At the time of Mr. Hughes' death there was past due on account of the purchase price of the land \$8,800 and, on unmatured installments thereof, the further sum of \$16,900. Evidently to obtain money with which to pay the obligations in arrears, a written contract was made September 30, 1909, by the plaintiffs and Sharkey, whereby he secured from them \$10,000, and agreed to complete the purchase of such land, to take the title in his name, but to hold an undivided half of the premises for them and to execute a declaration of such trust. The contract further provided that he should sell the land,

receive payments therefor, retain 15 per cent thereof as commission, and on the first day of each succeeding month render an accurate statement of the sums so obtained to the plaintiffs, who were entitled to one half of the money, less such brokerage. It was guaranteed by the writing that from the profits to be derived from such sales the plaintiffs would double their money, and if they failed to do so Sharkey would make up the deficiency. This contract was never recorded. The last testament of Mr. Hughes was duly admitted to probate October 18, 1909, and Mrs. Hughes was regularly appointed administratrix with the will annexed and thereupon qualified for the trust. Pursuant to an order of the County Court of Multnomah County, Oregon, and in consideration of the payment of a sum of money by Sharkey on account of the debt that was past due, and the giving by him and his wife of a mortgage of the premises, to secure \$14,881.23, the remainder of the purchase price, Mrs. Hughes in her representative capacity and individuality, and Mrs. Martin and her husband on November 8, 1909, executed to Sharkey a deed conveying all such real property. In consideration of the release by the defendant Richardson of Sharkey's promissory note for \$3,500 and interest and the payment by Richardson of the remainder of \$10,000, Sharkey agreed to convey to a corporation to be formed by them an undivided half of such lands. G. W. Holcomb, Richardson and Sharkey on April 22, 1910, incorporated the Richardson-Sharkey Company, with a capital stock of \$25,000, divided into 250 shares of the par value of \$100 each. Of these Richardson subscribed for 100 shares, Sharkey for a like number, and Holcomb for 1 share. The company was organized the next day by electing as directors each of such stock subscribers who after

having duly qualified chose Sharkey president, Holcomb vice-president, and Richardson secretary and treasurer. Sharkey and his wife, on April 23, 1910, for the expressed consideration of \$20,100, evidenced by the capital stock subscribed for, executed to the Richardson-Sharkey Company a deed to all such real property that remained unsold, subject, however, to the lien of the mortgage referred to, and also transferred to the corporation all the contracts that had been made for the sale of land and the right to the money then remaining due thereon, amounting to \$23,468.47, whereupon shares of capital stock were issued and delivered as subscribed for.

1. The plaintiffs have received on account of the \$10,000 which they furnished to Sharkey only \$924.28. He on May 9, 1911, caused to be conveyed, by a corporation in which he was interested, to the plaintiff Frank I. Weber, 76 lots in Waverleigh Heights, a suburb of Portland, which real property was then heavily encumbered with liens. This deed was not recorded until August 9th of that year, when the culmination of threatened suits against Sharkey evidently induced the filing of the conveyance in the proper office. The grantee last named testified that such deed was executed and recorded without his knowledge, while Sharkey stated upon oath that the conveyance was made pursuant to an agreement with such witness who accepted the land in full settlement of all claims on account of the \$10,000 so furnished. Based on this testimony the trial court found that the conveyance was intended only as a mortgage to secure the plaintiffs' demand. That court not only saw these witnesses but, as indicated by an expression in the transcript, personally knew them, and hence the finding in this particular must be upheld.

A. B. Richardson testified that on July 14, 1911, Sharkey transferred 90 of his 100 shares of the capital stock of the corporation, but it does not appear to whom they were assigned, or what sum of money or value in property, if any, was given for them. It appears from the record of a stockholders' meeting, held August 30, 1911, that the following named persons were present and held corporate stock, viz.: A. B. Richardson, 197 shares, J. P. Sharkey, 2 shares; J. P. Mattingly, 1 share, and G. W. Holcomb, 1 share. From this entry it is fair to infer that Richardson had secured 97 shares of the stock originally held by Sharkey, but whether he paid anything therefor is not disclosed by the transcript of the testimony. The shares of stock held by Holcomb and Mattingly, respectively, were paid for by Richardson as testified to by him.

The stockholders of the Richardson-Sharkey Company, at a special meeting held August 30, 1912, by a vote of a majority of all the stock, adopted supplementary articles, whereby the name of the corporation was changed to that of the defendant, the Richardson Investment Company, and five days thereafter the Secretary of State issued a certificate acknowledging the filing and recording of such additional instrument.

It is contended by appellants' counsel that as the contract entered into between the plaintiffs and Sharkey was never recorded, and as no other stockholder ever knew anything about such agreement until this suit was instituted, the Richardson-Sharkey Company was an innocent purchaser of the real property; that in negotiating such sale Sharkey acted adversely for himself, and the knowledge he had of such trust, though he was president of the corporation, is not chargeable to it; that as between the appellants and the plaintiffs the failure of the latter to secure the

money furnished to Sharkey was due to their neglect to have the contract recorded, and the loss occasioned thereby should fall on them rather than on innocent third persons who relied upon the validity of the record title, and for these reasons an error was committed in rendering the decree herein.

2, 3. The contract entered into by the plaintiffs and Sharkey was neither sealed, witnessed nor acknowledged, and if it had been recorded, no notice would have been imparted. It is reasonable to suppose that the declaration of trust which Sharkey was to have made when he secured the title to the land would have been executed with such formalities as to entitle it to be recorded. The recognition of the plaintiffs' right in the premises never having been legally made by Sharkey, they cannot properly be accused of any neglect in failing to give notice of the trust which should have been charged upon the land.

4. The general rule, deduced from the presumption that official duty will be regularly performed, is that notice given to the president or other manager of a corporation is notice to it. This precept is usually subject to the exception that when such officer acts for himself and adversely to the corporation, the presumption referred to cannot reasonably be indulged that he would voluntarily inform his principal of any fact tending to disparage the title or to diminish the interest which he would seek to establish to his own advantage, and in such case the knowledge he possesses cannot be imputed to the corporation: 1 Am. & Eng. Ency. Law (2 ed.), 1145; 10 Cyc. 1063; Angell & Ames, Corp., § 308; Clark & Marshall, Corp., p. 2207. In a note to the case of *Bookhouse v. Union Publishing Co.*, 2 L. R. A. (N. S.) 993, 996, in referring to two qualifi-

cations of the deviation from the general rule, it is said:

“(1) That the exception does not apply when the officer of the corporation, though he acts for himself or a third person, is also the sole representative of the corporation in the transaction. This qualification, as applied by the cases, is not at all dependent upon the question whether or not the corporation would be benefited by the transaction as a whole, if the knowledge possessed by its officer were held not to be chargeable to it. (2) That the exception does not apply where the corporation, if it were held not to be chargeable with notice of the fraud of its officer, would, as a result of the whole transaction, be in a better position than if the transaction had never taken place.”

5. Assuming, without deciding, that the Richardson Investment Company had no knowledge of the contract entered into by Sharkey and the plaintiffs, whereby a trust was to have been charged upon the land in their favor, and that notice thereof cannot be imputed to the corporation, a court of equity will brush aside the several transfers and look through the whole transaction when such course can be pursued without injury to innocent parties. It will not be presumed that Sharkey intended to commit a wrong when he agreed with Richardson to transfer on the latter's account an undivided half interest in the land to the corporation, and hence it must be taken for granted that he was dealing only with his own moiety in the premises. It will be kept in mind that he conveyed to the corporation the entire real property and also assigned to it the sums of money due and to mature on contracts he had made for the sale of parts of the land. As he received for the estate and choses in action thus granted and transferred corporate stock of the par value of \$10,000,

such proportional part of the capital equitably belongs to the plaintiffs.

6. The testimony shows that prior to the trial herein, Sharkey had transferred this block of stock, and that Richardson held nearly all of it. A careful examination of the transcript of the testimony fails to show that he paid any consideration for this stock. It was incumbent upon him to establish that fact, but, having failed in this respect, it must be taken for granted that he was not an innocent purchaser thereof. In the notes to the case of *Hagerman v. Buchanan*, 14 Am. St. Rep. 732, 748, it is said:

“As a voluntary transfer must either be enforced or disregarded, according to the intent which must be imputed to the grantor at the time it was executed, it is of the utmost importance to ascertain from what circumstances the fraudulent intent should or should not be presumed. If the grantor is at the time financially embarrassed, if there are judgments rendered or actions pending against him or suits threatened, his voluntary conveyance is unquestionably fraudulent and void as against creditors.”

It appears from the evidence that at one time Sharkey was wealthy, but his money being invested in suburban real property, and sales thereof having temporarily declined, he became financially embarrassed, so much so that several suits were instituted against him and he was seemingly compelled to resort to expedients which in prosperous times he would have scorned. We conclude, therefore, that the last transfer by Sharkey to Richardson of such stock was fraudulent and void as against the plaintiffs.

7. The trial court decreed that upon the payment by the defendants to the plaintiffs of \$9,075.72, the remainder due, with interest, all the real property involved herein should be discharged from the trust, but

if the former failed in this respect, the latter should have a lien on an undivided one half of the premises as security for the payment of that amount, free from any encumbrances created or suffered by either of the defendants, but no time was specified within which the payment was to be made. This part of the determination will be modified so as to allow 60 days from the entry of the mandate in that court in which to raise that amount of money, and if it is not paid within that time, this decree shall stand as and for a conveyance to the plaintiffs of an undivided one half of all the real property involved and also all interests of the defendants therein as of April 23, 1910, when the deed was executed to the Richardson-Sharkey Company.

8. In preparing the decree several lots were inadvertently included, which should not have been so listed, and this error must be corrected in the mandate. As no provision was made in the decree that the plaintiffs upon receiving the amount of money awarded them, or in default thereof by taking title to an undivided half of the premises, should convey to the defendant corporation the interest which they hold by deed as security in the Waverleigh Heights lots, another alteration must be made to that effect. With these modifications the decree complained of should be affirmed; and it is so ordered.

The changes that have been indicated are not considered of sufficient importance to entitle the appellants to their costs in this court.

MODIFIED AND AFFIRMED.

FURTHER MODIFIED AND REHEARING DENIED.

MR. JUSTICE BURNETT, MR. JUSTICE MCBRIDE and
MR. JUSTICE BENSON CONCUR.

Modified and rehearing denied May 25, 1915.

ON PETITION FOR REHEARING.

(147 Pac. 1199.)

Opinion by MR. CHIEF JUSTICE MOORE.

In a petition for a rehearing attention is called to a clause in the original opinion wherein it is stated that, unless the sum of money awarded the plaintiffs is paid them within 60 days from the entry of the mandate in the lower court, the decree appealed from would stand as and for a conveyance to the plaintiffs of an undivided one half of all the real property involved, including all interests therein of the defendants as of April 23, 1910, when the deed was executed to the Richardson-Sharkey Company. It is asserted that, prior to the commencement of this suit, many tracts of the land referred to were sold and conveyed to innocent purchasers, who would sustain loss if a lien were impressed upon the real property which they purchased from the corporation last named and from its successor, the Richardson Investment Company. In answer to this contention it is sufficient to state that such purchasers were not parties to this suit, and the decree rendered herein can have no binding force as to them. When the decree is undertaken to be enforced against such persons, they will undoubtedly be given an opportunity to show that they were innocent purchasers, for a valuable consideration, and without notice of the plaintiffs' equity in the real property. It is maintained that an error was committed by this court in determining it was Richardson's duty to allege and prove that he paid a valuable and adequate consideration for an assignment of the remainder of Sharkey's corporate stock, since the *bona fides* of the transfer

was not challenged in the complaint. The complaint was framed on the theory that Richardson was in fact the corporation, though a few other persons held stock which he had purchased in order to enable them to qualify as directors, so as to vote as he commanded in all matters pertaining to the management of the corporation. Sharkey was in equity a trustee, and held one half of the corporate stock for the plaintiffs: *Bisbee v. Mackay*, 215 Mass. 21 (102 N. E. 327). It appears from the petition for a rehearing that Richardson controls this block of stock, having purchased it and paid therefor a valuable consideration, a fact which was not disclosed at the trial. Such evidence of corporate indebtedness having been obtained directly from the trustee by Richardson, his ownership thereof can be protected only by affirmatively showing he was not chargeable with notice of the fact that the stock equitably belonged to the plaintiffs and that Sharkey was disposing of it in breach of the trust: *Cook, Stock and Stockholders* (3 ed.), § 325. In preparing the complaint in the case at bar the plaintiffs' counsel evidently were not aware of the transfer of the remainder of Sharkey's stock to Richardson, and the initiatory pleading should be treated as a bill for a discovery, requiring Richardson to set forth in his answer the nature and extent of his title and to substantiate such averment by evidence that he had paid an adequate and valuable consideration for the stock without knowledge or notice of any rights of the plaintiffs thereto. In speaking of that which is put forth by the party proceeded against as a reason in law or fact why the plaintiff should not recover what he seeks, a text-writer, touching particularly upon the subject of a *bona fide* purchaser, remarks: "Unless the facts appear on the face of the complaint, so as to permit a

demurrer, there can be no doubt that in the new system, as well as in the old, the defense must be pleaded, in order to be available": 2 Pomeroy, Eq. Jur. (3 ed.), § 784. It was stipulated by counsel for the respective parties that a clause in the former opinion should be amended, so as to require the plaintiffs, upon receiving the sum of money awarded therein, or in default thereof by taking an undivided one half of the premises, to convey to the defendant Sharkey the interest which they held by deed as security in the Waverleigh Heights lots. As thus modified, the original opinion is adhered to, and the petition for rehearing denied.

MODIFIED AND REHEARING DENIED.

Argued April 1, modified April 20, rehearing denied May 25, 1915.

TOOMEY v. CASEY.

(147 Pac. 920. See, also, 72 Or. 290, 142 Pac. 621.)

Account—Evidence—Cost of Building.

1. In an action for an accounting under an agreement to divide the cost of a building erected on premises leased by the parties to the contract, opinion evidence introduced with consent of the parties—defendant's evidence being discarded because he had fraudulently raised receipts for money paid to inflate the cost of the building—considered, and the cost of the building determined.

Appeal and Error—Review—Action in Lower Court.

2. Where, in an action for an accounting under an agreement to divide the cost of erecting a building, an architect was by consent appointed to determine the actual cost of erection, and defendant's motion for an order to allow the introduction of evidence, if appraisal was unsatisfactory, was denied, the court on appeal cannot review the denial of the motion; defendant not appearing at the hearing at which the witness gave his testimony, and no offer being made to introduce other evidence, though the court had no power to make the testimony of the architect final.

From Multnomah: **GEORGE N. DAVIS**, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by J. M. Toomey against J. D. Casey to vacate a settlement of their reciprocal demands and also to surcharge the plaintiff's account. It is alleged in the complaint in effect that, in consideration of the plaintiff's agreement to erect a building on lots 6 and 7 in block 37 in Couch's Addition to the City of Portland, the owners of the premises executed to him a lease thereof, August 14, 1908, for a term of 25 years, for which he stipulated to pay a monthly rental; that soon after the lease was made the plaintiff orally agreed to convey an undivided one half of the leasehold interest to the defendant, who, in consideration thereof, undertook to become equally bound by all the terms of the demise, whereupon he entered into joint possession of the premises with the plaintiff, and on March 16, 1909, the agreement was reduced to writing, subscribed by the parties, and duly recorded; that pursuant to the terms of the lease the parties hereto erected on the premises a building, expending in its construction, equipment, furnishing and in paying rent, taxes, insurance, etc., \$79,742.40, and there remains due on his half thereof \$25,344.96; that on November 11, 1910, the plaintiff and the defendant attempted to settle such indebtedness, but by their mutual mistake many items of the account were inadvertently omitted; and that the plaintiff has no speedy or adequate remedy at law.

The answer denied some of the averments of the complaint, and for a further defense alleged substantially that the settlement referred to was fairly made and fully understood by each party, and the plaintiff ought to be and is estopped thereby. For a second defense it is averred in effect that on March 1, 1910,

when the building was fully completed, the plaintiff, in consideration of having the use of the entire structure, agreed to pay the defendant as his share of the rent \$600 a month, and pursuant to such contract the plaintiff and his tenants occupied the premises until September 14, 1910, whereby there became due the defendant \$3,900, which, with the sums of money theretofore paid by him on account of the erection of the building, amounted to \$21,800, and he has overpaid his share of the construction and other expenses to the extent of \$4,000, which sum he is entitled to recover from the plaintiff.

The reply denied the allegations of new matter in the answer, and, as the issues required the examination of a long and complicated account, the cause was referred. From the testimony taken by the referee the court was unable to determine the original cost of the building, and with the consent of counsel for the respective parties appointed Oscar W. Horne, an architect, to ascertain that fact, and upon his testimony, in connection with other evidence, a finding was made that the entire sum of money expended in the structure was \$32,768.39; that the plaintiff had also paid rents, taxes, insurance and laid out for furniture, equipment, etc., the further sum of \$13,806.92, aggregating \$46,575.31, one half of which sum, or \$23,287.65, was chargeable to the defendant, who was entitled to credits on account thereof amounting to \$20,460.90, thereby leaving due from him to the plaintiff \$2,826.75. A decree having been rendered in accordance with such findings, the defendant appeals.

MODIFIED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondent there was a brief and an oral argument by *Mr. B. G. Skulason*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The plaintiff evidently intended to compel the defendant to pay, as his half of the expenses claimed to have been incurred, more than the entire cost of the building, equipment, furnishings, etc., for in the original complaint he set forth as items of the account demands for sums of money which, in many instances, were more than twice the amounts that he had paid. As a witness in his own behalf he was examined by his counsel with respect to each item in regular order as set out in the primary pleading, and testified that he had paid the sum of money so stated. In order, apparently, to substantiate such testimony, and in corroboration thereof, he identified and there were received in evidence receipted bills tending to show the payment of sums of money by him, and checks issued to other persons on banks, which had paid and canceled such orders, returning them to him. After his testimony had been given, the further hearing of the cause was postponed for a few days, during which time the defendant's counsel interviewed many of the persons and firms who, or the agents of corporations which, had signed the bills or indorsed the checks mentioned, and in many instances it was found that, after getting possession of these papers, the plaintiff changed them by raising the amounts. His plan of altering receipted bills is illustrated by the claim of *Albert J. Capron*, who furnished builders' material; the demand therefor, omitting the dates when the goods were severally delivered, being \$10.80, to the left of which the figure 3 was written; \$7.20, changed to \$107.20; \$4.40 to \$404.40; \$178 not altered; and \$26.90

changed to \$226.90; and the total, \$227.30, made to read \$1,227.30, thereby raising the amount \$1,000.

A check drawn by Toomey on the Portland Trust Company of Oregon, payable to the order of J. H. Bader, for \$75, was altered by the plaintiff, after it had been paid and returned to him, by prefixing to the figures "75" the figure "2," and by writing the words "Two Hundred" before the words "Seventy-five and no/100 Dollars," thereby raising the amount \$200. From an examination of this check it would seem that in issuing it the plaintiff purposely wrote the words "Seventy-Five" to the right and near the printed word "Dollars," so as to leave space to the left for inserting the words "Two Hundred" or some other phrase when the order was canceled and returned. An inspection of several other checks that were raised exhibits the same manifest peculiarity.

A receipt given to the plaintiff December 12, 1909, by William Vaetz for \$15,000.65, for brick furnished for the building and mason work performed thereon, was received in evidence to establish a claim for one half that sum against the defendant, when it was conclusively proved at the trial that such demand, which was set forth in the complaint, comprised charges also set out in that pleading, thereby duplicating the items. It is unnecessary to set forth the substance of any more of these writings which were changed by the plaintiff. As an excuse for their alteration, he testified on rebuttal that in many cases he paid further sums than indicated by the receipts and checks, and in order properly to keep an account of the money thus expended he raised the figures so as to correspond with the cash actually paid out. The trial court disregarded the plaintiff's evidence in every particular, except in those instances in which the testimony of the

original claimant substantiated the validity of the respective demands. In order to determine the cost of the building, it becomes necessary to examine with care opinion evidence as to the expense reasonably incurred in the structure. The architects who prepared the plans and specifications of the building estimated that its original cost was \$35,500.

Charles W. Ertz, an architect who was employed by the defendant for that purpose, carefully inspected the building and testified that, without including the entire foundation, a part of which wall originally supported an old structure, the expense incurred in putting up the building was \$23,010.40, giving a detailed statement of the cost of many items which composed that total.

J. N. McNeil, another architect, who assisted Ertz in making an examination of the building, corroborates that witness in respect to the cost of the structure, saying that the only items omitted were the calcimining of the rooms, plastering the walls, and plumbing. In referring to the estimate thus made McNeil testified:

"We arrived at those figures just as though we had estimated the building to take the contract. We would have done it on that basis."

Not being satisfied with either of the estimates thus given, the court suggested to counsel the advisability of appointing a disinterested architect to make an independent valuation of the cost of the structure, to which proposition both counsel originally acceded. After Oscar W. Horne had been selected for that purpose, the court was requested to make an order allowing either attorney, if dissatisfied with the appraisal thus to be made, to introduce other evidence upon the subject; but the application was denied. When Mr. Horne had performed the required service, the

court notified counsel for both parties that the architect's testimony would be taken; but defendant's attorney did not attend the hearing, whereupon the witness gave the value as hereinbefore stated.

2. No statute exists in this state authorizing a court, in a case of this kind, to compel a submission of an issue of the value of property to an expert for his determination, or to coerce the parties into an arbitration. Though the order requested was not made, the effect of the court's appointment of Mr. Horne was to open the cause to receive further testimony, and it was incumbent upon defendant's counsel to have cross-examined the architect when called, and if his explanation was disappointing, it was the duty of such attorney to have offered to produce witnesses, giving their names, and to have stated that, if they were permitted to testify, they would contradict the declarations made upon oath by Mr. Horne, and would reduce his estimate as to the cost of the structure. By this means the defendant's counsel could have brought up for consideration the court's refusal to make the requested order, which action he now insists was erroneous.

The estimate made by Mr. Horne is challenged in several particulars, and it is attempted to be indicated by argument that some of the items which go to make up the total cost of the building should not have been included in his appraisalment. If the witness had been cross-examined as to these matters, or if other testimony had been offered tending to contradict him, the questions now urged would be less difficult to solve.

The court, considering some other matters hereinafter mentioned that were not embraced in Mr. Horne's estimate, found the original cost of the building to have been \$32,768.39. Of this sum the archi-

tect's statement shows the contractor's profit should have been \$2,722.23. It appears from the transcript that William Vaetz had general charge of the brickwork, cement and masonry, and that he performed the service, not as a contractor, but as a day laborer. This item must therefore be excluded.

As a part of the cost of the building Mr. Horne estimated the architect's fees for preparing plans and specifications to have been \$1,796.67. The receipted bill of Whidden & Lewis for the performance of that service was only \$750, and hence a further reduction of \$1,046.67 must be made. As a part of the cost of the structure he estimated the salary of a superintendent to have been \$800. The transcript shows that N. Lougenbaugh performed that service, for which he was paid only \$420, as appears by his receipts which were offered in evidence. A further diminution must be made of \$380.

The testimony given by Mr. Horne as to the entire cost of the building did not include heating and plumbing. When his testimony was concluded, the court remarked that since the worth of an excavation on the premises, which cellar was enlarged, and the value of some bricks in an old wall, that was incorporated into the new structure, had not been taken into account in making up the estimate, allowances for these items would be made. As the ultimate cost of the building as found by the court was determined to have been \$32,768.39, instead of \$31,741.29, the sum estimated by the architect, though the items from which such conclusion is arrived at are not stated, it will be assumed that the value of the plumbing and heating exceeded the worth of the excavation and of the value of the bricks to the extent of the difference between the cost

of the structure as found by the court and the estimate as made by Mr. Horne, or \$1,027.10.

Deducting from \$46,575.31, the entire cost of the building and the sums of money paid out for rent, taxes, insurance, furniture, etc., as found by the court, the sum of \$4,148.90 on account of the excess in the estimate as to the contractor's profit, the architect's fees, and the superintendent's salary, there remains as the ultimate expense incurred for the purposes stated \$42,426.41, one half of which, or \$21,213.20, is properly chargeable to the defendant and on account of which he has paid \$20,460.90, as further found by the court, thereby leaving due the plaintiff \$752.30.

The decree will therefore be modified, and the plaintiff awarded a recovery against the defendant of the remainder last stated.

MODIFIED. REHEARING DENIED.

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS CONCUR.

Argued May 5, affirmed May 25, 1915.

CHORD v. HUBER.

(148 Pac. 1128.)

Quieting Title—Right to Relief—Possession of Plaintiff.

1. A party out of possession of land cannot maintain a suit to quiet title against one in actual possession under Section 516, L. O. L., authorizing any person claiming an interest in real estate not in the actual possession of another to bring an action against anyone claiming an adverse interest therein to have the adverse claims determined.

[As to suits to remove clouds on title, see notes in 67 Am. Dec. 110; 45 Am. St. Rep. 373. As to necessity that plaintiff in such action allege title or possession at time of commencement of suit, see note in Ann. Cas. 1913D, 386.]

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is a suit by Eliza Chord against F. J. Huber to quiet title to certain real estate in the City of Baker. The complaint is in the usual form, and alleged that plaintiff was in possession of the premises at the commencement of this suit. Defendant answered denying plaintiff's title and possession, and alleging title in fee in himself. He further pleaded adverse possession for more than ten years, and asked affirmative relief, but subsequently and before the conclusion of the trial obtained leave, without objection, to file an affirmative answer in which the prayer for affirmative relief was eliminated. The court dismissed the suit without prejudice, and plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. John L. Rand.*

For respondent there was a brief over the name of *Messrs. Clifford & Correll*, with an oral argument by *Mr. Morton D. Clifford.*

MR. JUSTICE McBRIDE delivered the opinion of the court.

The evidence is clear that plaintiff was not in possession at the time the suit was begun, but that defendant was in actual possession, although the question of whether such possession had been held adversely for ten years is debatable. The court dismissed the suit for the reason that plaintiff had not shown possession at the commencement of the suit as required by Section 516, L. O. L., but that defendant was in actual possession. That a party out of possession cannot maintain a suit to quiet title against one in actual

possession is clearly established in this state: *Edgar v. Edgar*, 26 Or. 65 (37 Pac. 73); *Moore v. Shofner*, 40 Or. 488 (67 Pac. 511); *Hendershott v. Sagsvold*, 49 Or. 592 (90 Pac. 1104). The case of *State v. Warner Valley Stock Co.*, 56 Or. 283 (106 Pac. 780, 108 Pac. 861), does not conflict with the decision above cited as the latter case was not a suit to quiet title, but to have canceled certain deeds alleged to have been wrongfully obtained from the state by defendants. In that case the court used the following language, which is applicable here:

"If plaintiff is out of possession and his remedy by ejectment is adequate, then equity will not entertain jurisdiction to remove a cloud, but there are many *quia timet* actions in which the remedy at law is not adequate, and of which equity will entertain jurisdiction whether plaintiff is in or out of possession."

Here there can be no question as to the adequacy of plaintiff's remedy at law as her title is clearly shown by the record.

The original complaint having been superseded by the amended one, and therefore being no longer a part of the record, cannot be considered as a waiver of the jurisdictional question. This controversy belongs on the law side of the court, and the decree of the Circuit Court is therefore affirmed.

AFFIRMED.

Argued May 6, reversed May 25, 1915.

STEWART v. ERPELDING.

(148 Pac. 1129.)

Injunction—Grounds—Prevention of Irreparable Loss—Complaint.

1. In an action to restrain the removal of personalty from premises leased to defendants, where the complaint did not allege that the property was attached to the realty, or that the proposed manner of removal would injure either the realty or the personalty, an allegation of irreparable injury, without a recital of any facts indicating a probability thereof, being a mere conclusion of law, and the insolvency of the defendants not being sufficient of itself to show that the removal would cause irreparable injury, the complaint failed to give jurisdiction in equity.

Injunction—Grounds—Prevention of Irreparable Loss—Sufficiency of Evidence.

2. In an action to restrain the removal of personalty from leased property, evidence *held* insufficient to sustain the complaint alleging the necessity of an injunction to prevent irreparable loss.

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by R. A. Stewart against John P. Erpelding and Peter Kessler, partners, doing business under the firm name and style of Erpelding & Kessler, to enjoin the removal of certain personal property from a building in Ontario, Oregon, formerly occupied by defendants as a retail liquor saloon. The complaint alleges, in substance, that the defendants, as partners, leased from plaintiff a building in Ontario, which contained certain personal property consisting of saloon fixtures and furnishings, which are enumerated; that during the second year of such lease, and at the time of commencing this suit, defendants were threatening to remove said personal property from said building without authority and against the wish of plaintiff; that plaintiff is the sole owner of the property, which is of the reasonable value of \$1,500, and that, if removed, it will be greatly injured and virtually

destroyed, to his irreparable damage in the sum of \$1,500; that defendants are inpecunious and unable to respond in damages. The defendant Kessler filed an answer which denies that any of the personal property described in the complaint is owned by plaintiff, and alleges affirmatively that he is the sole owner and entitled to the possession thereof. A reply being filed, consisting of general denials, defendant Kessler moved for a dismissal of the complaint upon the ground that the same did not state any fact giving a court of equity jurisdiction of the subject matter. This motion being denied, the cause proceeded to trial, and from a decree in favor of plaintiff, defendant Kessler appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. C. McGonagill*.

For respondent there was a brief and an oral argument by *Mr. William E. Lees*.

MR. JUSTICE BENSON delivered the opinion of the court.

There are some 22 assignments of error, but we do not deem it necessary to consider more than the sufficiency of the complaint and the proof in support thereof.

1. The complaint does not state facts sufficient to give a court of equity jurisdiction. There is no fact alleged which shows that the personal property is in any way attached to the realty, or that the proposed manner of removal would in any way injure either the realty or the personalty. The allegation of irreparable injury, without a recital of any facts which would indicate the probability thereof, is a mere conclusion of law. The insolvency of the defendants is

not of itself sufficient to invoke the intervention of a court of equity: *Parker v. Furlong*, 37 Or. 251 (62 Pac. 490).

2. But, if the allegations of the complaint were sufficient, there is a total lack of evidence to sustain them. There is not a syllable of testimony as to the possible injury of the personal property in such removal, nor is there a particle of evidence in the record as to the financial ability of the defendants or either of them. The entire testimony is directed to the question of ownership and right of possession. This is a question with which we are not at this time concerned. The plaintiff doubtless has a remedy for the recovery of the property, if it be his, but not in equity.

It follows that the decree must be reversed and the suit dismissed; and it is so ordered.

REVERSED. SUIT DISMISSED.

Argued May 6, affirmed May 25, 1915.

RICHEN v. DAVIS.

(148 Pac. 1130.)

Mines and Minerals—Public Mineral Lands—Quieting Title—Evidence—Assessment Work.

1. In an action to quiet title to a placer mining claim, evidence held to show that the work of clearing brush and trees therefrom, done by plaintiffs the year prior to defendant's relocation, was for the purpose of enabling the claim to be worked by dredging, and was therefore assessment work, which prevented a forfeiture of the claim.

Mines and Minerals—Public Mineral Lands—Quieting Title—Burden of Proof—Forfeiture.

2. In a suit to quiet title to a placer mining claim against a junior locator, the burden is on the junior locator to show failure by the senior locator to do the annual work required by Revised Statutes of the United States, Section 2324 (Comp. Stats. 1913, § 4620).

Mines and Minerals—Public Mineral Lands—Forfeiture—Resumption of Work.

3. Where the senior locators of a placer mining claim had resumed work thereon prior to the relocation of the claim, the land was not subject to relocation.

Mines and Minerals—Public Mineral Lands—Forfeiture—Degree of Proof.

4. To establish forfeiture of a mining claim, it must be shown by clear and convincing proof that the former locator has failed to perform the work or make the improvements required, since forfeitures are not favored.

Mines and Minerals—Public Mineral Lands—Forfeiture—Resumption of Work—Intervening Claim.

5. Where the senior locator of a placer mining claim had failed to do the required assessment work, a relocation by another, who also failed to do the work for a succeeding year, does not terminate the right of the senior locator to resume work thereon, so as to authorize a third person to relocate the claim after the senior locator had done the assessment work for a succeeding year, since it is only against intervening rights that a resumption of work on a mining claim does not resuscitate the possessory rights of the claimant.

[As to abandonment or forfeiture of mining claims, see note in 87 Am. St. Rep. 403.]

Mines and Minerals—Public Mineral Lands—Assessment Work—Character of Work.

6. The fact that the claimant of a placer claim fenced it and pastured a cow thereon and cut firewood therefrom, while such work cannot be counted as part of assessment work, does not defeat the possessory rights of the claimant, where sufficient mining work was done thereon.

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit by D. E. Richen and Curtis Haley against Titus E. Davis, to quiet title to an unpatented mining claim covering the southeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 29, township 9 south, range 37 east, Willamette Meridian, containing approximately 10 acres of placer ground near Sumpter, Oregon. The Circuit Court rendered a decree in favor of the plaintiffs, and the defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John L. Rand*.

For respondents there was a brief over the names of *Mr. William Smith*, *Mr. Morton D. Clifford* and *Mr. George E. Allen*, with oral arguments by *Mr. Smith* and *Mr. Clifford*.

MR. JUSTICE BEAN delivered the opinion of the court.

The plaintiffs base their claim to the mining ground upon a location made April 27, 1905, by plaintiff D. E. Richen and one Wm. H. Kitchen, under the name of the Kentucky Placer Mining Claim; a proper record having been made afterward. The rights of Kitchen under the location have since been acquired and are now held by plaintiff Haley. The defendant claims the ground under a location as a placer claim made by him June 26, 1914, notice of which was duly recorded. The answer admits the location made in 1905, under which the plaintiffs claim. It is the contention of defendant Davis that no work in assistance of extracting the mineral from the ground was done upon the property by Richen and Kitchen between 1905 and 1914, when it was located by him. He states that no work was done "to my satisfaction." In his behalf it is asserted that the clearing of brush and timber on the premises during 1913 was for the purpose of obtaining firewood, and that the only use made of the land was residing upon it and using it for pasture. All parties admit it to be placer ground and valuable for mining purposes. The main question for determination is: Was the land unappropriated or open to relocation when Davis attempted to relocate it June 26, 1914, or had the claim of plaintiffs been kept alive by the proper amount of assessment work being done

during the year 1913 or before defendant posted and recorded his notice?

Placer mining claims are subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but, where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands: Section 2329, U. S. Rev. Stats. (Comp. Stats. 1913, § 4628; 3 Fed. Stats. Ann. 604). Local rules and regulations of miners and state statutes are recognized as controlling when not in conflict with laws of the United States, subject to certain requirements, among which are the following: The location must be distinctly marked on the ground so that its boundaries can be readily traced. On each claim, until a patent has been issued therefor, not less than \$100 worth of labor shall be performed, or improvements made during each year. Upon failure to comply with the conditions required—

“the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location”: Section 2324, U. S. Rev. Stats. (Comp. Stats. 1913, § 4620; 3 Fed. Stats. Ann. 600).

It is claimed that, in fulfillment of the requirements of the last-named section, the plaintiffs performed the requisite amount of labor during the year 1913, and were at work upon the claim at the time Davis attempted to make his entry. The proof submitted fairly substantiates this claim of plaintiffs. It seems that, for several years after the location in 1905, interest in mining was at a low ebb, and but little work

was done on the claim. In recent years the Powder River Dredge Company has been operating a dredge in the immediate vicinity of the premises in controversy. The officers of the company drilled seven holes to bedrock near the line of this ground in order to prospect the same, and imparted to Mrs. Richen, who appears to be the moving spirit on the plaintiff's side, the information that, to dredge the claim and obtain the gold, it would be necessary, first, to clear away the timber, brush and coarse débris thereon. The land is comparatively level, having a fall of only 1 per cent; too flat for successful hydraulic mining. The evidence shows that plaintiffs had peaceable possession, and that the following work was done in good faith by them during the year 1913:

William Baker worked 14 days, for which he received	\$ 42 00
Fitchner worked in April and May	20 00
Fitchner worked 16 days in the fall.....	40 00
Mose Smith, December 31st	3 00
Mrs. Richen, 24½ days and some nights at \$1.25.....	30 70

Making a total shown by the evidence....\$135 70

1. The above was for the purpose of preparing the ground for dredging and extracting the mineral. Considerable labor was also performed by them during the early part of 1914, before defendant initiated his claim. It is shown that the work performed in 1913 was worth more than the estimated cost; that about 1½ acres of the land was cleared; and that the same was worth from \$125 to \$175 per acre. Some land in that district, somewhat similar, has been cleared at an expense of \$200 per acre. Defendant does not deny that work was done on the claim during the time mentioned, but asserts that it was not mining work.

This allegation he has failed to establish. On the other hand, the evidence preponderates in favor of the fact that the more profitable and practical way of extracting the mineral is by means of a dredge, and that, in order to do so, it is absolutely necessary to clear off the brush and timber. It appears that a portion of the land was covered with a thick growth of brush, some larger timber, and considerable débris which had been deposited by the river during high water. In his evidence defendant pictures the open land, and minimizes the brush, timber and débris formerly on the claim. He asserts that the brush was only cut away to make room for the ax in cutting the timber for firewood, but the evidence shows otherwise. What we deem a fair statement comes from one of the defendant's witnesses, Mr. S. S. Terrill, to the effect that $4\frac{1}{2}$ or 5 acres, about half of the tract, were originally in brush, and now only 1 or $1\frac{1}{2}$ acres; that they cut the brush "tolerable clean" during the last few years. It is evident that more than \$100 worth of labor has been bestowed in reducing the acreage of brush and timber.

2. Davis undertook to make a relocation of the claim, and it devolves upon him to show that the rights of the prior locators, Mrs. Richen and the assignee of Kitchen, have expired by abandonment, forfeiture, or for other causes: 27 Cyc. 601. This burden he assumed in this case, but failed to support his claim by proof.

3. It is shown on the part of plaintiffs that the ground was appropriated on June 26, 1914. Mrs. Richen and Haley being at work on the claim at that time, the land was not then subject to relocation: *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 936), and cases there cited.

4. In order to establish forfeiture of a mining claim, it must be shown, by clear and convincing proof, that the former locator and owner has failed to have the work performed or the improvements made as required by the statute. Forfeitures are not favored in such cases. Abandonment is a question of intent: *Hammer v. Garfield Min. Co.*, 130 U. S. 291 (32 L. Ed. 964, 9 Sup. Ct. Rep. 548); *Von Schmidt v. Huntington*, 1 Cal. 55, 6 Morr. Min. Rep. 284; 27 Cyc. 600; *Thomson v. Allen*, 1 Alaska, 636; *Loeser v. Gardiner*, 1 Alaska, 641; *Colman v. Clements*, 23 Cal. 245; *Crown Point Min. Co. v. Crismon*, 39 Or. 364 (65 Pac. 87). Section 544 of 1 Snyder on Mines says:

“Since it is axiomatic that forfeitures are odious to the law, and for that reason are not countenanced or favored by the courts, all doubtful cases will be construed against the forfeiture. But, while this is true, the law exacts a faithful compliance with the conditions required. Yet the burden of proving a forfeiture falls upon the person alleging it, and it is always a question of fact for the jury whether a mining claim had been abandoned or forfeited prior to relocation.”

Thus far we have considered the rights of the plaintiffs and the defendant to the possession of the claim in question, which, in our opinion, are the only questions necessary for discussion. It is earnestly urged by the learned counsel for defendant that other matters have a bearing upon the case, to which we will briefly refer.

5. Prior to the plaintiffs' location in 1905, the premises were located and claimed as placer ground, and an application for a patent was made by one W. A. Ellis for a tract of land, including the premises in controversy, as a placer claim. While the application was pending, Ellis conveyed the tract to V. R. Meade.

Patent was refused because of the protest filed by Mrs. Richen. Mrs. Richen had resided in a tent upon the land and in a building constructed thereon by a local militia company, prior to the plaintiffs' location, for about 14 years. In 1902 defendant constructed a house upon the premises and has resided thereon a portion of the time since. At one time about ten dwelling-houses were situate on the land. On January 1, 1910, V. R. Meade located the ground and recorded his notice of location, a copy of which is found in the record. He failed to perform the assessment work during the year 1911, and relocated the claim on January 1, 1912. He states, however, that he did not stake the claim nor mark the boundaries thereof, and he appears to have done nothing to develop the same. He asserts no right to the land, and, so far as the title of plaintiffs or defendant to the property is concerned, his attempted location amounts to nothing. If this were subtracted from plaintiffs' right, it would not change the same. If added to defendant's claim, it would have no effect thereon. We consider, therefore, that the attempted location of Meade does not affect the case. There has been controversy before the Department of the Interior of the United States and litigation in the state courts growing out of the Ellis location, and considerable animosity has been engendered between some of the parties, echo of which is distinctly heard in these proceedings. A short time before the present suit, defendant Davis was notified to quit the premises. He states in regard to the matter that "if they had let me alone I would never have disturbed them," and testifies in substance that if they had properly requested him to abandon the land he would have moved his house away. It is argued on the part of defendant that the notice filed and re-

corded by Meade in 1910 cut off and terminated any rights of the plaintiffs. This, at the most, would not be a sufficient cause for the forfeiture of the claim of plaintiffs, which, as we have above indicated, is not favored by the courts. It may be true that there was a lack of the required amount of assessment work performed by the plaintiffs on the claim prior to 1913, and on account thereof a default. However, the required annual work for that year was done by the plaintiffs, and their right to the claim was thereby revived, notwithstanding the previous default, which was thereby cured: *Crown Point Min. Co. v. Crismon*, 39 Or. 364 (65 Pac. 87), citing *Justice Min. Co. v. Barclay* (C. C.), 82 Fed. 554. The filing and recording of the notice by Meade would not change the default nor prevent the right of plaintiffs from being resuscitated. Mrs. Richen relocated January 1, 1912, but makes no claim on account thereof. The possession of the land is the only thing involved, and it is as against intervening rights that a locator cannot resume work and resuscitate his possessory rights: 1 Lindley on Mines (2 ed.), § 330. The right of defendant Davis did not intervene between plaintiffs' location and the time of the performance of the required amount of labor by them. The object of posting and recording mining notices is to protect the locator and give him an opportunity to develop the property and obtain the ore and eventually get title to the land, if he continues the improvement to a sufficient extent. Defendant must rely upon his own right or title and cannot strengthen the same by tacking on a stale claim of some other person. As between plaintiffs and defendant, the former claim of Meade counts for naught. This we understand to be in harmony with the rulings of the Department of the Interior of the United States,

which have long been in vogue, relating to public lands. Whether the entry by Meade was made in good faith, or what his intentions were, or whether the same was valid, cannot be shown by Davis in order to affect his claim. Such entry did not inure to the benefit of Davis any more than to plaintiffs.

6. Much reliance is placed upon the fact that Mrs. Richen fenced the land and pastured her cow thereon. This would neither enrich nor diminish the value of the mineral in the ground. She obtained some four or five cords of wood from the land which did no harm. She swears, and it is not successfully refuted, that she takes no account of the cordwood in her calculations of the value of the representation labor. Her personal toil upon the ground in clearing and burning the brush and debris is a fair indication of her good faith in maintaining her claim. That, with the money expended in the same direction by Haley, negatives any intent to abandon the mine, and shows a resumption of the required labor prior to the attempted relocation of Davis.

The trial judge heard the evidence, personally examined the premises in controversy, and found the facts substantially as above indicated. We think his conclusions were correct. There is some conflict in the evidence, but principally as to deductions and conclusions.

It follows that the decree of the court should be affirmed, and it is so ordered.

AFFIRMED.

Argued May 3, reversed May 25, 1915.

**NORTHWEST STEEL CO. v. SCHOOL DIST.
NO. 16.***

(148 Pac. 1134.)

Schools and School Districts—Schoolhouses—Liability to Materialman.

1. One furnishing material to a contractor, erecting a schoolhouse for a school district which had neglected to exact a bond required by Section 6266, L. O. L., of anyone contracting with any school district for the construction of any building, with the additional obligation that he will promptly pay all materialmen, had a right of action against the district for damages consequent upon the contractor's insolvency leaving a balance due for the materials furnished.

From Umatilla: **LAWRENCE T. HARRIS**, Judge.

In Banc. Statement by **MR. JUSTICE BENSON**.

This is an action by the Northwest Steel Company, a private corporation, against School District No. 16 of Umatilla County, Oregon, a municipal corporation. The facts are as follows:

In January, 1912, the defendant school district entered into a contract with the Advance Construction Company for the erection of a schoolhouse, exacting from the said company a bond for the faithful performance of the terms and conditions of such contract, but failed to require any bond for the protection of materialmen and laborers in the collection of their claims. Plaintiff, a private corporation, furnished certain structural steel to be used in the erection of the building at the agreed price of \$3,212. Certain payments were made by the contracting company upon the indebtedness thus incurred, but, while there was still

*As to personal liability of public officer for failure to take bond or for taking insufficient bond from contractor, conditioned for payment of claims of subcontractors, materialmen and laborers, see notes in 49 L. R. A. (N. S.) 1199. **REPORTER.**

a balance of \$810.70 due and unpaid thereon, the construction company became insolvent, and made an assignment for the benefit of its creditors, and is unable to pay this claim. Plaintiff sold and delivered the steel, not upon the credit of the construction company, but relying upon the presumption that the defendant would obey the mandate of Section 6266, L. O. L., which provides that:

“Any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state for the construction of any buildings * * shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts.”

The above covers the substance of the allegations of the complaint, except as to certain details unnecessary to this discussion. The prayer of the complaint demands damages in the amount of plaintiff's unpaid claim, with interest. A demurrer to the complaint was sustained, the action dismissed, with judgment in favor of defendant for its costs and disbursements, and plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. A. R. Watzek, Messrs. Platt & Platt* and *Messrs. Raley & Raley*, with an oral argument by *Mr. Watzek*.

For respondent there was a brief over the name of *Messrs. Carter & Smythe*, with an oral argument by *Mr. Charles H. Carter*.

MR. JUSTICE BENSON delivered the opinion of the court.

There is but one question to be determined, and that is: Has the materialman, under the facts stated, a right of action against the school district for damages by reason of the negligence of the defendant in failing to exact a bond such as is required by Section 6266, L. O. L.? Defendant contends, and the trial court held, that the requirements of the statute create a public, and not a corporate or municipal, liability and therefore the defendant is not liable in damages for failure to comply therewith. There appear to be but few cases in which the question as applied to statutes similar to ours has been considered, and our attention has been called to the decisions of only three states, which are Michigan, Minnesota, and Kansas. Of these, the Michigan cases support the contention of plaintiff, while those of Minnesota and Kansas maintain an interpretation favorable to the defense.

We shall first consider the Michigan statute (Public Acts 1883, No. 94) and decisions. The title of the act reads:

“An act to insure payment of wages earned, and for materials used in constructing, repairing, or ornamenting public buildings and public works.”

Section 1 is as follows:

“That when public buildings, or other public works, are about to be built, repaired, or ornamented under contract, at the expense of this state, or of any county, city, village, township or school district thereof, upon which buildings or works liens might attach for labor or materials if belonging to private persons, it shall be the duty of the board, officers or agents contracting on behalf of the state, county, city, village, township or school district, to require sufficient security, by bond, for the payment by the contractor, and all sub-

contractors for all labor performed or materials furnished in the erection, repairing, or ornamenting of such building."

Then follow various provisions for making the act effective. The first reported case under this statute is that of *Owen v. Hill*, 67 Mich. 43 (34 N. W. 649), in which the trustees of a school district were made defendants in an action, similar to the one at bar, to recover damages sustained by the negligence of the defendants to exact the statutory bond. The court held that the act of requiring the bond is a ministerial act, involving no discretion, and consequently no judicial functions. The acts of fixing the amount in which the bond shall be given and of passing upon the sufficiency of the sureties are conceded to be, in a limited measure, judicial, but these acts were not the ones of which complaint was made. The opinion then discusses the question as to whether the requirements of the act constitute a public duty or a corporate one. Upon this point the court says:

"In this case the position was assumed by counsel for defendants that the duty imposed by the statute was a public duty, and the neglect to perform it only affected the public. If this were so, there would be no liability. But the contrary is, to my mind, the object and purpose of the law. The duty was imposed to protect individuals, and for the benefit of individual laborers and materialmen. That this is so is too plain for argument. No person can read the condition of the bond and not be satisfied that it was intended for the protection of the individuals who should furnish to the contractor or subcontractor either labor or material. Express provision of the law is that the bond shall be deposited for the use of any person interested therein, and that it may be prosecuted and recovery had by any person, etc., to whom any money shall be due and payable on account of having performed labor,

etc. The principle is this: 'That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed; if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it or to perform it properly, is an individual wrong, and may support an individual action for damages': Cooley, Torts, 379. I am aware that it may be regarded as a great hardship to impose this liability upon persons who accept office and perform burdens gratuitously. But the law makes no exceptions, and I can make none. It is presumed that they know the law, and the further presumption is that they will obey it. If they do not, on whom should the loss properly fall; on those who neglect to perform a duty enjoined by law, or those whom the law was designed to protect from loss?"

The leading Minnesota case is that of *Ihk v. Duluth City*, 58 Minn. 182 (59 N. W. 960). This was an action for damages incurred through the city's neglect to exact a bond, under the provisions of the municipal charter which are stated, in the opinion, to be as follows:

"That, whenever the board of public works shall award a contract for making any of the improvements mentioned in the subchapter, the person to whom it is awarded shall furnish to the city a bond with sufficient sureties, to be approved by the board of public works, conditioned that he will execute the work for the price mentioned in the bid and according to the plans and specifications, and that he will pay for all labor done and material furnished for said improvement."

The court holds that the city is not liable, for the reason that the duty to exact the bond is a public, and not a corporate, duty, and cites Dillon on Municipal

Corporations, Section 967, as the controlling test. In order to make clear the application, we quote the following from the opinion:

“The distinction between these two classes of duties, i. e., municipal or corporate duties, and public duties, and that for misfeasance or nonfeasance, that in the one case the municipality will be liable, and not in the other, is well established: 2 Dillon, Mun. Corp., §§ 966, 967. The difficulty usually lies in determining what are to be deemed municipal or corporate duties and what public duties. The test suggested by Dillon in Section 967, that to be a municipal duty it must relate to the local or special interests of the municipality, is the most reasonable and satisfactory test, and was applied by this court in *Bryant v. City of St. Paul*, 33 Minn. 289 (23 N. W. 220, 53 Am. St. Rep. 31). Tried by that test, the duty to take a bond for security of laborers and materialmen was a public, and not a corporate, duty; in other words, it was imposed on the particular officers, and not on the corporation as such. It did not relate to the local or special interests of the municipality nor of its citizens. It was a matter of indifference to the city that those claims were or were not secured. Such a bond, when taken, operates as security not merely for those who reside in the city, but equally for those who reside elsewhere—in Wisconsin, for instance.”

The leading Kansas case is that of *Freeman v. City of Chanute*, 63 Kan. 573 (66 Pac. 647). This was a similar action based upon a statute (Gen. Stats. Kan. 1901, § 5130; 1 Code Civ. Proc., § 638e) which reads, in part, as follows:

“Whenever any public officer shall, under the laws of the state, enter into contract in any sum exceeding \$100 with any person or persons, for purpose of making any public improvements, or constructing any public building, or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in

a sum not less than the sum total in the contract, conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

The act further provides for filing such bond with the clerk of the district court, and contains other details for making the act effective. The court held that the city was not liable, for the reason that the duty imposed by the statute was a public, and not a corporate, one, expressly following the case of *Ihk v. Duluth*, 58 Minn. 182 (59 N. W. 960), calling special attention to the fact that the duty to exact the bond is imposed, not upon the corporation itself, but upon the officer. We have set out pretty fully the holdings of the courts of the states which have passed upon the question before us for the purpose of comparison. It is noteworthy that in all three of the cases the statute places the burden of requiring the bond upon particular officers, while the Oregon statute treats of the corporation as an entity. They all agree that the controlling problem is to determine whether the duty enjoined by law is a public or a corporate one. The Michigan court takes for its test the language of Judge COOLEY, which we reiterate:

"That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages": Cooley, Torts, 379.

The others adopt as decisive the rule as expressed in Dillon's *Municipal Corporations* (4 ed.), Section 967, from which we quote:

“Not only is the distinction just mentioned well established, but, as practically applied in the reported judgments of the courts, it has tended, in our judgment, to promote justice and to secure individual rights. This liability on the part of municipal corporations springs, as we think, from the particular nature of the duty enjoined, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary, legislative or judicial, and from the means given for its performance, which must be ample, or such as were considered to be so by the legislature, and not from the supposed circumstance that they received and accepted their charters or grants of powers and franchises upon an implied contract with the state that they would discharge their corporate duties, and that this contract inures to the benefit of every individual interested in the performance.”

We are unable to see that this section supports the contention for which it is cited, and we think that the quotation from Cooley on Torts is the authority applicable to the case at bar. It must not be forgotten that these laws were enacted for the purpose of protecting laborers and materialmen in cases wherein the lien laws are ineffective. To entertain the theory of the Minnesota and Kansas courts would be to thwart the plain purpose of the statute by invoking a doctrine whose application thereto is far fetched. We therefore conclude that the trial court erred in sustaining the demurrer.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MR. JUSTICE HARRIS and MR. JUSTICE BEAN took no part in the consideration of this case.

Submitted on briefs May 5, affirmed May 25, 1915.

STATE v. ALEXANDER.*

(148 Pac. 1136.)

False Pretenses—Defenses—Illegality of Transaction—Sale of Land by Indian—Statutes.

1. Under Section 1964, L. O. L., denouncing the crime of obtaining money by false pretenses, the defendants, a mixed-blood Indian woman and her husband, were indicted for having represented to the prosecuting witness that the woman was owner of 160 acres of land, which land was an allotment by the United States Department of the Interior to one D., an Indian, from whom the woman claimed as heir, and that she was authorized to lease such land without interference from the superintendent in charge of an Indian reservation or the Department of the Interior. *Held*, that a demurrer to the indictment was properly sustained; the prosecuting witness, in attempting to obtain the lands having violated act of Congress of February 8, 1887, c. 119, 24 Stat. 389 (U. S. Comp. Stats. 1913, § 4201), Section 5, providing that any contract touching land set apart and allotted to an Indian before the expiration of 25 years shall be void, while the statute relative to obtaining money by false pretenses is to protect only innocent persons, not those in any degree *particeps criminis* with the defendant.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

This is a criminal prosecution, under Section 1964, L. O. L., for obtaining money under false pretenses, the proof of which is controlled by Section 1541, L. O. L. The defendant Laura V. Alexander is a mixed-blood Indian woman, and her husband, H. H. Alexander, a white man. The charge in the indictment is that by certain fraudulent pretenses Laura V. Alexander represented that she was the owner of 160 acres of land, which is described in the indictment, said land being an allotment by the United States Department of the Interior to Joe Depot, from whom Laura V. Alexander claims as heir; that she was authorized and

*As to illegal purpose of prosecutor as affecting guilt of obtaining property by false pretenses, see notes in 17 L. R. A. (N. S.) 276 and 39 L. R. A. (N. S.) 423. REPORTER.

empowered to make a contract in regard to the leasing of said land without the consent of or interference from the superintendent in charge of the Umatilla Indian reservation or the Department of the Interior of the United States. This much of the statement carries with it the inference that the prosecuting witness knew that she only had a right to contract in regard to the land with the consent or control of the superintendent of the reservation or from the Department of the Interior. It is further alleged that the prosecuting witness paid to the defendant Laura V. Alexander \$1,150 for the said lease. There is first a question raised as to the sufficiency of the indictment, but we will pass that over and go directly to the question of the right of the prosecuting witness to initiate this action against the defendant. Submitted on briefs without arguments under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For the State there was a brief over the names of *Mr. Frederick Steiwer*, District Attorney, and *Messrs. Fee & Fee*.

For respondents there was a brief submitted by *Mr. Homer I. Watts*.

MR. JUSTICE EAKIN delivered the opinion of the court.

The control of the Indians, not only of their persons, but their property and lands, is reposed by act of Congress in the Interior Department, so that an allottee under the law cannot make a contract in relation thereto without the consent and approval of the Interior Department, or of the agent at the reser-

vation. The indictment alleges that these are reservation lands claimed by the defendant Laura V. Alexander as heir of said Depot. Congress passed an act on February 8, 1887, found in 3 Fed. Stats. Ann. 494, Section 5 of which provides, among other things:

"Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made. * * And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

So that, with the knowledge of the facts set forth in the indictment, the prosecuting witness, J. M. Bannister, had notice of the relation of defendant Laura V. Alexander to the reservation of these lands allotted. Therefore he was *particeps criminis* to the effort to obtain these lands in violation of the particular language of the statute, which was also a violation of the criminal law. It is said in *People v. Stetson*, 4 Barb. (N. Y.) 151:

"The statute relative to obtaining money, etc., by false tokens or pretenses was not designed to protect any but innocent persons, nor those who appear to have been in any degree *particeps criminis* with the offender."

To the same effect is *State v. Crowley*, 41 Wis. 271 (22 Am. Rep. 719), in which Justice Lyon says:

"I have not found one [case] which was held to be within the statute in which the transaction on the part of the person injured would not have been lawful. * *

I cannot believe the statute was designed to protect any but innocent persons, nor those who appear to have been in any degree *particeps criminis* with the defendant."

And he concludes:

"After much investigation and deliberation, we have reached the conclusion that the rule of the New York cases (*People v. Stetson*, 4 Barb. (N. Y.) 151), is supported by better reasons, as well as by the weight of authority, and that it is our duty to adopt it. We do so with hesitation, because able judges and courts have held a different rule, and with reluctance, because the acts of the defendants, * * as disclosed by the evidence, were outrageous and indefensible, and the perpetrators richly merit punishment. But it is far better that they should escape punishment under this information than that sound legal rules should be disregarded to meet the supposed exigencies of a particular case."

In *McCord v. People*, 46 N. Y. 470, it is said:

"The design of the law is to protect those who, for some honest purpose, are induced, upon false and fraudulent representations, to give credit or part with their property, and not to protect those who, for unworthy or illegal purposes, part with their goods."

The prosecuting witness in this case was seeking by an unlawful act, subjecting him to criminal prosecution, to obtain these lands from the allottee without the approval of the Interior Department or of the agent of the reservation. The case is not parallel with many cases cited by the defendant, but was simply a criminal act or representation by one who was under no disability or protection of the government. Here the Indians were expressly disqualified to make any contract in relation to these lands. The government, by the passage of that statute, sought to protect them and their lands against just such transactions as this one, and the prosecuting witness cannot say that his act

might have been prosecuted as criminal and have the defendant prosecuted for the false representations which he must have known were false. We cannot sanction his effort in an attempt to illegally obtain this land from one who is disqualified to dispose of it, and, overlooking his criminal act, punish the defendant for her part in the transaction.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Argued May 5, affirmed May 25, 1915.

JOHNSON v. HOT SPRINGS LAND & IMP. CO.*

(148 Pac. 1137.)

Negligence—Swimming-pool—Injuries to Diver—Liability of Proprietor.

1. Although the proprietor of a swimming-pool is not an insurer of the safety of patrons, he is required to use reasonable care in furnishing reasonably safe conditions, and, if they are not reasonably safe, because of depth of water too slight to permit diving with safety, on failure to give notice of such condition and to warn patrons, the proprietor is liable for any resulting injury.

[As to duty to patrons of proprietor of bathing resort or beach, see note in Ann. Cas. 1913D, 1217.]

Negligence—Swimming-pool—Injuries to Diver—Contributory Negligence.

2. In an action by the administrator of one killed by diving and striking the bottom of a swimming-pool on account of the insufficient depth of water, where the deceased was a good diver, had been in the plunge previously when the water was at its usual and safe depth, where he was told upon inquiry that the water was only half the usual depth, and was shallow, but was coming in fast, where he waited for the tank to fill up, where he saw his friends standing in the pool, and so was able to judge the depth of the water for himself, and where it was apparent that he realized the danger of diving, he was guilty of contributory negligence.

*The authorities passing upon the liability of one maintaining a bathing resort for the safety of patrons are reviewed in the notes in 3 L. R. A. (N. S.) 982, 1132; 32 L. R. A. (N. S.) 715; 38 L. R. A. (N. S.) 72, and 42 L. R. A. (N. S.) 1073.

REPORTER.

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is an action by Rasmus Johnson, administrator of the estate of Arthur Johnson, deceased against the Hot Springs Land & Improvement Company, a private corporation, for causing the death of plaintiff's intestate.

The defendant maintains a natatorium which is open to the public for swimming, diving and bathing for hire. Arthur Johnson dived off a spring-board into the swimming-pool, struck his head on the bottom, was seriously injured, and thereafter died from the effects of the injury so received. Charging that the defendant was guilty of negligence causing the injury and consequent death of Arthur Johnson, his administrator commenced this action to recover damages.

The complaint alleges, in substance, that the natatorium was held out to the public as a safe and suitable place for bathing, swimming and diving, and that a spring-board was maintained as an inducement to the patrons of the place to dive in the swimming-tank; that the water was less than four feet in depth, and was so shallow as to constitute a dangerous place for swimming and diving; that the agents of the defendant failed to warn Arthur Johnson that on account of the shallowness it was dangerous to dive into the water, but that, on the contrary, they told and assured him that the water was deep enough to dive in from the spring-board; that the deceased, at the time of the injury, was unfamiliar with the premises, and did not know the risk of diving; and that he relied upon the assurance of the defendant that the swimming-tank was a safe place in which to dive, and also upon the

fact that the defendant rented him a bathing suit and failed to warn him of any danger of diving.

After denying culpability, the answer alleges that the floor of the tank is on an inclined plane, so that, when the tank is filled, the depth of the water is graduated from about four feet in one end to about seven feet in the other end of the pool; that because of the quality of the water the bottom is distinctly visible even to a casual observer; that for sanitary reasons the tank is frequently emptied, cleaned and then re-filled; and that the depth of the water was plainly apparent to the deceased. The answer further alleges that the defendant had posted signs in conspicuous places warning all persons that if they dived in the plunge they did so at their own risk; that Arthur Johnson had knowledge of such warning, and assumed the risk of diving from the spring-board; and that the injury was caused by the negligence of the deceased.

On motion of defendant, judgment of a nonsuit was given against the plaintiff, who then appealed.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. C. O. Hindman* and *Mr. William H. Packwood, Jr.*

For respondent there was a brief with oral arguments by *Mr. Joseph J. Heilner* and *Mr. William Smith.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The testimony will be recounted before attempting to determine the soundness of the ruling made by the trial court. The deceased was aged about 19 years

and 3 months on June 6, 1913, when injured. He had worked about 5 years in box factories, was of ordinary intelligence, could read English, was practically a grown man, was a good swimmer and diver, and had been in the plunge two and perhaps more times previous to the accident. Having gone to the natatorium, accompanied by three friends, Walter Murphy, Ray Peck and Louin Halvorsen, for the purpose of using the tank, Johnson and his companions rented bathing suits from an employee of the defendant, and at that time, one of the party having inquired about the depth of the water, they were told by the employee mentioned that the water was shallow, and was 3 to 3½ feet deep, but that it was coming in fast, and it would not be long until the tank was full. They were neither told that the pool was safe for diving nor warned that it was unsafe. The shallowness of the water being apparent, they sat around and waited "for the water to fill up." The spring-board extended about 5 or 5½ feet from the bank, was more than 2 feet above the surface of the water at the time of the injury, and was located at the deeper end of the pool about 80 or 90 feet distant from the place at the opposite end of the tank, where the defendant kept the bathing suits for rent, and in plain view of the employee in charge of the suits.

After waiting about 20 minutes, Johnson and his three friends went to the dressing-room, and, having put on bathing suits, they walked to the deeper end of the tank, and there entered the water by diving in, after having passed a painted, but somewhat dimmed, sign which was designed to give warning that, "Persons diving do so at their own risk." There is no evidence that Johnson observed the sign at any time, although Peck and Halvorsen had seen it on previous

occasions. Murphy, Peck and Halvorsen each testified that after entering the water and by standing up in it the depth was found to be between 3 and 3½ feet, but no one remembered having seen Johnson standing up in the water, although they were together in plain view of each other all the time. They had been swimming and diving about 15 minutes. Peck and Halvorsen each had dived off the bank three or four times, and Johnson had done the same thing twice. Murphy had dived off the spring-board three or four times before Johnson dived off the spring-board. Halvorsen testified:

That he saw Johnson dive in. "He stood upon the board. I don't know, in some way he must have lost his balance. He was going to make a long dive, to make it shallow in the water; and in some way, when he went to spring, his feet kind of went out, and he came right straight down." That "he couldn't come down straight in three feet of water."

When asked to explain how Johnson dived off when hurt, Ray Peck said that:

"He stood on the board, and I was swimming toward the ladder. I was swimming sideways, and I could see Arthur dive, and I seen him as he came down. His foot seemed to slip, or he lost his balance in the air, and he came down straight, and I said, 'That was a pretty straight one, old man,' and turned and swam to the ladder."

1. Stating the law with reference to, and as limited by, the facts in the instant case, it may be said that the defendant was not an insurer of the safety of Arthur Johnson: *Levinski v. Cooper* (Tex. Civ. App.), 142 S. W. 959; *Williams v. Mineral City Park Assn.*, 128 Iowa, 32 (102 N. W. 783, 111 Am. St. Rep. 184, 5 Ann. Cas. 924, 1 L. R. A. (N. S.) 427); *Scott v. Uni-*

versity Athletic Assn., 152 Mich. 684 (116 N. W. 624, 125 Am. St. Rep. 423, 15 Ann. Cas. 515, 17 L. R. A. (N. S.) 234); 38 Cyc. 269. Where a person, however, provides accommodations of a public nature, that person is required to use reasonable care and diligence in furnishing and maintaining such accommodations in a reasonably safe condition for the purpose for which they are apparently designed and to which they are adapted. If for any reason the accommodations are not reasonably safe and suitable for the purposes for which they are ordinarily used in a customary way, then the public should be excluded entirely, or appropriate notice of the unsafe and unsuitable condition should be given, and persons warned of the dangers in using them. The spring-board and the water beneath it constituted the accommodations which the defendant furnished to the deceased, who was a patron for hire, and, as such, was using them for diving purposes, to which they were adapted, and in the way in which they were customarily used. Persons patronizing the natatorium have a right to assume that the defendant has performed its duty, and that reasonably safe and suitable accommodations have been furnished: 38 Cyc. 268; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310 (66 N. E. 968, 61 L. R. A. 829). If by reason of the shallowness of the water the spring-board and the water beneath it were not reasonably safe for diving, then it was the duty of defendant to warn Arthur Johnson of the unsafe condition in order that he might be made aware of the danger; and therefore, if defendant failed to perform its duty, it was guilty of negligence which would be actionable if proximately causing the injury, unless the deceased was himself chargeable with contributory negligence: *Turlington v. Tampa Electric Co.*, 62

Fla. 398 (56 South. 696, Ann. Cas. 1913D, 1213, 38 L. R. A. (N. S.) 72); *Larkin v. Saltair Beach Co.*, 30 Utah, 86 (83 Pac. 686, 116 Am. St. Rep. 818, 8 Ann. Cas. 977, 3 L. R. A. (N. S.) 982); *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310 (66 N. E. 968, 61 L. R. A. 829); *Higgins v. Franklin County Agr. Soc.*, 100 Me. 565 (62 Atl. 708, 3 L. R. A. (N. S.) 1132); *Williams v. Mineral Park Assn.*, 128 Iowa, 32 (102 N. W. 783, 1 L. R. A. (N. S.) 427, 111 Am. St. Rep. 184, 5 Ann. Cas 924); *Boyce v. Union Pac. Ry. Co.*, 8 Utah, 353 (31 Pac. 450, 18 L. R. A. 509).

2. One of the objects of the rule requiring the owner of a place of amusement like the one maintained by defendant to warn patrons of danger is to acquaint the patron with the hazard so that he may avoid injury. If the deceased had knowledge of the shallowness of the water and the danger incident to diving from the spring-board, then he knew all and no less than he could have known had defendant expressly warned him of the risk. If the defendant had, in fact, cautioned Johnson against the peril, and, notwithstanding such warning, the latter dived off the spring-board, then, on the facts of the instant case, the defendant would not be liable because of the knowledge imparted to Johnson; and so, too, the same result follows if Johnson did, in fact, know of the danger, even though not told by the defendant. If, with knowledge of the danger, Johnson placed himself in peril, and, on account thereof, was injured, he was chargeable with contributory negligence: *Larkin v. Saltair Beach Co.*, 30 Utah, 86 (83 Pac. 686, 116 Am. St. Rep. 818, 8 Ann. Cas. 977, 3 L. R. A. (N. S.) 982); *Bass v. Reitdorf*, 25 Ind App. 650 (58 N. E. 95); 29 Cyc. 474. Arthur Johnson was a good diver; he had been in the plunge at least on two prior occasions

when the water was at its usual depth of about seven feet; he and his friends were told, upon making inquiry, that the water was between 3 and 3½ feet deep, and that it was shallow, but that the water was coming in fast; he and his companions sat around and waited "for the water to fill up," because the shallowness was apparent; he could not well have avoided seeing his friends standing up in the water; and consequently he must have known the depth of the water. It is also clear that he knew and realized the danger of diving off the spring-board into the water at the same time because, as Halvorsen said, Johnson was going "to make a long dive to make it shallow in the water," and his feet slipped, or he lost his balance in the air, and he came down straight.

The evidence has been narrated and considered in a light most favorable to the plaintiff, and the conclusion is inevitable not only that Johnson knew the depth of the water, but that he also appreciated the danger. The fact that he attempted "to make a long dive to make it shallow in the water" reflects the knowledge then had by the deceased. After making due allowance for the difference in temperament, knowledge and judgment of different men, it is plain that reasonable minds would draw no other inference or conclusion from the unchallenged facts than that the deceased was guilty of contributory negligence because he dived off the spring-board with knowledge of the existing conditions and a realization of the hazard: *Walsh v. Oregon R. & N. Co.*, 10 Or. 250; *Massey v. Seller*, 45 Or. 267 (77 Pac. 397).

The judgment of nonsuit was correct, and is affirmed.

AFFIRMED.

Argued May 5, affirmed May 25, 1915.

IN RE DIGGINS' ESTATE.

DIGGINS v. DIGGINS.

(149 Pac. 73.)

Wills—Validity—"Testamentary Capacity."

1. Where a testator at the time he executes his will understands the business in which he is engaged, has knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses "testamentary capacity," notwithstanding old age, sickness, disability or extreme distress.

Wills—Validity—Incapacity—"Delusion."

2. A "delusion" indicating testamentary incapacity must spring up spontaneously in the mind of the testator, and not be the result of extrinsic evidence of any kind.

[As to insane delusions as affecting testamentary capacity, see note in 63 Am. St. Rep. 94. As to testamentary capacity and contractual contrasted, see note in Ann. Cas. 1915A, 362.]

Wills—Validity—"Undue Influence."

3. "Undue influence" sufficient to set aside a will must be such as to overcome the free volition or conscious judgment of the testator and to substitute the purposes of another instead, and must be the efficient cause of the disposition of the property.

Wills—Validity—Undue Influence—Confidential Relations.

4. Where a confidential relationship existed between testator and the beneficiary, and the will is inconsistent with the claims of duty and affection, slight evidence that the beneficiary has abused the confidence will suffice to invalidate the will.

Wills—Contest—Evidence—Incapacity—Undue Influence.

5. In proceedings to contest a will, evidence held to show that the testator had sufficient testamentary capacity; that he was under no delusion as to the amounts he had given contestant and was not unduly influenced.

[As to undue influence as invalidating wills, see notes in 16 Am. Dec. 257; 21 Am. St. Rep. 94; 31 Am. St. Rep. 670.]

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

David Diggins died on September 2, 1912, leaving a will which was contested by his son, Thomas L. Dig-

*The authorities passing upon what constitutes testamentary capacity are presented in the notes in 27 L. R. A. (N. S.) 2 and L. R. A. 1915A, 443.

gins. By the terms of the will, which was executed March 13, 1912, the testator directs the payment of his debts; provides for a tombstone for himself and one for his wife, Malvina A. Diggins, provided she does not again marry; directs the construction of a suitable iron fence around his lot in Prairie Creek Cemetery; bequeaths to Prairie Creek Cemetery Association \$250, provided that the association shall first have constructed a substantial and suitable addition to the church building located on the cemetery grounds; bequeaths to Thelma Diggins and David Diggins, Jr., children of Thomas L. Diggins, each the sum of \$100, which shall be placed at interest and paid over when the legatees become 21 years of age, but if one dies both sums shall be paid to the other, or if both die before the age of 21 years then the entire bequest shall become the property of their father, Thomas L. Diggins; bequeaths \$100 to Thomas L. Diggins; gives to his wife, Malvina A. Diggins, a lot in the town of Joseph, Wallowa County, Oregon, and all of the household goods, furniture and effects; bequeaths to his wife, Malvina A. Diggins, in lieu of dower, such sum as may be necessary for her maintenance and support so long as she shall remain his widow, not exceeding the sum of \$500 each year; and gives the remainder of his estate to a stepson, Leroy G. Isley, to be held in trust by the executor, who shall pay to said stepson out of such remainder for his schooling, maintenance and support, during his minority, such sum as may be necessary until attaining the age of 21 years, and thereafter the executor shall pay over to Leroy G. Isley the net income until he shall have attained the age of 25 years, at which time, if the stepson is found to be an industrious, ambitious

and economical man and a good citizen, all such remainder shall be turned over to him, but if he is not at that time a man and citizen of the character mentioned, he shall receive only the net income until such time as he proves himself worthy. The will further provides that if the stepson, Leroy G. Isley, shall die, leaving no widow or legal issue, then the remainder shall go to the son, Thomas L. Diggins, and a niece, Mahala Diggins, share and share alike. S. P. Williams is appointed executor, and should any beneficiary contest or aid in contesting the will, then such beneficiary shall receive nothing. Unsoundness of mind and undue influence are assigned as the reasons for the contest. The petition assailing the will alleges in general terms that, as the result of old age and serious mental and physical diseases, the mind of deceased was unsound and his memory was destroyed; and it is then averred with some particularity that the deceased was entirely under the influence of Malvina A. Diggins and her son, Leroy G. Isley, and other persons acting with them. The will was admitted to probate by the County Court and sustained by the Circuit Court, whereupon the contestant again appealed.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Cochran & Eberhard* and *Mr. Samuel D. Peterson*, with an oral argument by *Mr. George T. Cochran*.

For respondents there was a brief over the names of *Mr. A. M. Runnells* and *Messrs. Sheahan & Cooley*, with oral arguments by *Mr. Runnells* and *Mr. Daniel W. Sheahan*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The surroundings of the litigants may be better apprehended after a brief statement of the relationship of the parties. Thomas L. Diggins is a son of deceased and of a former wife, from whom David Diggins became estranged. After the separation, and on May 30, 1894, David Diggins married Malvina A. Isley, who had several children of her own, one of whom is Leroy G. Isley, who at the time of the marriage was about 3 years of age. Leroy G. Isley lived with his mother and stepfather most of the time until the spring of 1909. David Diggins and his wife, Malvina A. Diggins, quarreled, separated and settled their property rights in 1904, but about two years thereafter they became reconciled, after some solicitation on the part of David Diggins, and resumed the relations of husband and wife. Malvina A. Diggins at the time of the execution of the will was not friendly to Thomas L. Diggins, and had not liked the latter after the trouble with her husband. The testimony clearly shows that the deceased during his lifetime entertained a genuine affection for his son, Thomas L. Diggins, and also for his stepson, Leroy G. Isley. David Diggins moved to Wallowa County with his family in July, 1894, and lived there until the time of his death. Thomas L. Diggins, who resided in Umatilla County, visited his father only four or five times after the latter moved to Wallowa County, but the father made a number of visits to his son at his home.

The execution of the will did not occur until after some deliberation. David Diggins engaged the services of an attorney, stating at the time that he desired to make a will, and telling how he wished to dispose of his property. A previous will was destroyed.

Three or four rough drafts were prepared, studied, considered and destroyed. At the end of two or three weeks, being satisfied with the language of the disputed writing which directed the disposition of the estate in conformity with his wishes as first expressed to his attorney, the testator formally executed his will. David Diggins knew the contents of each of the rough drafts as well as the provisions of the will itself. The only conclusion warranted by the evidence is that no person except the attorney and testator ever read any of the rough drafts of the will, or heard the same read.

1. Unsoundness of mind and undue influence constitute the grounds upon which the contestant rests his claim that the testator lacked the necessary capacity for making a valid will. The measure of capacity required has been stated many times by this court:

"If a testator at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body or extreme distress": *Ames' Will*, 40 Or. 495, 504 (67 Pac. 737, 741); *Hubbard v. Hubbard*, 7 Or. 42; *Clark's Heirs v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846); *Stevens v. Myers*, 62 Or. 372 (121 Pac. 434, 126 Pac. 29); *Wade v. Northup*, 70 Or. 569 (140 Pac. 451).

2. Definitions of a delusion, stated in different terms, but expressing the same meaning, appear in *Potter v. Jones*, 20 Or. 239, 248 (25 Pac. 769, 772, 12 L. R. A. 161), where this court quoting from *Middle-ditch v. Williams*, 45 N. J. Eq. 726 (17 Atl. 826, 4 L. R. A. 738), says:

"It is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind that can be regarded as furnishing evidence, that his mind is diseased or unsound; in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of the mind in which they originate."

In *Wade v. Northup*, 70 Or. 569 (140 Pac. 451), approval is given to the announcement appearing in *Fulton v. Freeland*, 219 Mo. 494, 517 (118 S. W. 12, 18, 131 Am. St. Rep. 576), in which it is said that:

"There is no such thing as a delusion founded upon facts. It is a mental conception in the absence of facts. If the idea entertained has for a basis anything substantial it is not a delusion. There may be a misjudgment of facts, or there may be an accentuated opinion founded upon insufficient facts, but not a delusion, rising to the dignity of a mental aberration."

See, also, the comprehensive notes to *Slaughter v. Heath*, 127 Ga. 747 (57 S. E. 69), as reported in 27 L. R. A. (N. S.) 1.

3. Undue influence sufficient to set aside a will—

"must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. * * It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denom-

inated undue or fraudulent, as a friend or relative, or even those in confidential relation, may employ argument, or even persuasion, to induce a bequest, so that, notwithstanding it leaves the mind free to act upon its own considerations and judgment": *Holman's Will*, 42 Or. 345, 358 (70 Pac. 908); *Pickett's Will*, 49 Or. 127, 153 (89 Pac. 377); *Turner's Will*, 51 Or. 1, 8 (93 Pac. 461).

4. If a close confidential relationship existed between the testator and the beneficiary, and the will as made is not consistent with the claims of duty and affection, then slight evidence that the legatee or devisee has abused the confidence imposed in him will suffice to invalidate the will: *Holman's Will*, 42 Or. 345, 359 (70 Pac. 908); *Turner's Will*, 51 Or. 1, 8 (93 Pac. 461).

5. No useful purpose can be served by recounting all the voluminous testimony, but it will be quite sufficient to refer to only so much of the evidence as is necessary to understand the condition of the testator's mind and his surroundings. David Diggins was aged about 79 years when making the will, and he left an estate valued at about \$21,000. He had been afflicted with palsy for some time; he had been troubled with a sore on one of his limbs, was childish, but had no hobbies, and his memory gradually failed, especially during the last two years of his life, although, like many aged people, he possessed an accurate recollection of the events of his early life. Although physically weakened by the infirmities of old age, he planted and cultivated a garden in 1911 and 1912. He was accounted a good trader, was not inclined to discuss his business affairs with other persons, transacted business before and after the date of signing the will, was set in his ways, firm in his ideas, and, as one witness expressed it, he was "a good stayer." He was

a constant reader of the newspapers, and discussed with intelligence all that he read. Before proceeding with the discussion, it is proper briefly to note the testimony of the witnesses concerning the mental condition of the testator.

F. F. McCully, who was one of the attesting witnesses, testified that he did not consider the testator competent to transact business without aid, because his memory was not good, although, as cashier of a bank, he would have honored any checks signed by David Diggins.

Dr. J. H. Thompson, who was the family physician and had known the deceased 11 or 12 years, deposed that he attended the testator during his last sickness, that the patient possessed a clear mind and was rational August 19, 1912, and that he was competent to transact business until about 10 days before his death, during which period the mind was affected by uremic poisoning.

J. M. Thompson said that he was intimately acquainted with the testator the last two years; that during that period he was a fine entertainer on whatever subject was discussed.

Mrs. Nathan Tryon believed that his mind during the last two years was just the same as it always had been, and she could not see anything wrong with his mind at all.

J. B. Streeter testified that his mind seemed always to be all right, and that he was not different from most people, except that he was afflicted with palsy.

Charles Scott testified that he had been acquainted with David Diggins since 1898, and saw the latter in August, 1912, and observed nothing unusual in his appearance.

Wesley Duncan knew Diggins since 1879, and met him quite frequently during the two years before his death; that—

“he was like most old men; as he got old and feeble he was more feeble. Ordinarily his mind was good. He got more forgetful as he got older and a little more easily excited.”

J. A. Rumble, upon returning from California on March 24, 1912, noticed that Diggins had failed physically and to some extent mentally.

E. T. Roup, a farmer and vice-president of the First Bank of Joseph, when speaking of his physical condition during the last year of his life, said that he had failed right along like any man would naturally, both mentally and physically, and was inclined to tell the same thing over once in awhile, like any old person would do.

Frank Stevenson said that his health failed during the last two years of his life, but could not say so much about his mental condition.

N. C. Longfellow testified that during the last two years of his life his health failed decidedly, and that his memory was failing him fast.

Charles McLane stated that during the last two years of his life “he was like any old man; he was feeble in health,” and childish, but could not say that his ability to transact business was affected.

S. H. Warfield, a brother-in-law, saw him in April, 1912, at which time he seemed to be more childish and nervous than before, but did not observe much difference in his memory.

The attorney who drew the will and Malvina A. Diggins stated that the testator was competent to dispose of his property and to transact business, while Thomas L. Diggins testified to the contrary. There

is evidence, however, to the effect that before the will was opened, and at a time when the contestant believed that he was made the principal beneficiary, he stated that "they would break \$60,000 before they would break the will."

The contestant urges with much emphasis the claim that his father entertained an unfounded belief, amounting to a delusion, that he had, before making his will, given to the son \$15,000 or \$20,000; that such delusion affected the terms of the will; and, further, that the provisions of the will, when applied to Leroy G. Isley, were glaringly inconsistent with the conditions surrounding the stepson, but were entirely congruous and harmonious when applied to the deceased's nephew, Charles Diggins, who had since died. So far as pertinent to the inquiry the evidence will be briefly noted. The contestant testified that his father told him in March or April of 1912, which was probably after the will had been executed, that:

" 'What I have,' he says, 'you will get. What I have will never go out of the Diggins' name.' "

The testator told the attorney who prepared the will that:

"In the past he had helped his son, probably giving him altogether something like \$15,000 or \$20,000, and that his son was worth probably three or four times as much as he was, and that he did not want to leave him over \$100."

During the period of about two years when David Diggins and his wife were separated, the former made his home with Thomas L. Diggins; and at some time during that period, probably in 1905, but before the reconciliation between David Diggins and his wife, when every circumstance pointed to the complete

absence of any possible undue influence, the testator, in a conversation with Charles Scott—

“talked about Tom, and he said he had given him all he intended to; that he had helped him lots when he was getting started, and he wouldn't give him any more. What he had he would give to someone else.”

The contestant testified that in about 1893 he purchased from the father 160 acres of land known as the Hurst place, giving therefor a span of colts valued at \$330 and a set of harness priced at about \$45, and that the land had been previously valued at \$800, and a short time afterward the son purchased from his father more land valued at approximately \$4,600, about 560 acres being the total amount of land conveyed by the testator to the contestant. The father had given the son \$30 in money, a horse, and a cow and in 1905 loaned him \$1,000 which was repaid. At the time of the trial Thomas L. Diggins owned 1,800 or 2,000 acres of land, and the value of his worldly possessions, when compared with the estate of his father, was about as stated by the testator.

The record shows conclusively and without any contradiction that David Diggins was attached to his son and took much pride in the fact that the contestant had acquired considerable property, and while it was not literally true that the son had been given \$15,000 or \$20,000, still the father no doubt considered that the transactions already narrated were helpful to the son to the extent that without them he would not have prospered, but by reason of them he was enabled to achieve the success afterward attained. The contestant purchased the Hurst place for one half the price previously placed upon it. The testator may have overestimated the assistance he gave to the son, and to that extent misstated the facts, but it is more than a plausible explanation to say that it is fair to assume

that the testator believed from what he had actually given the son, loaned to him and sold to him, when considered with relation to all the surrounding circumstances and in connection with all that followed, that he had helped the son to get a start in life and that such start was a help and worth much to the son; and, when thus viewing the situation of David Diggins, at the same time keeping in mind the fact that the record discloses that the father was not mistaken when he spoke of the value of the property possessed by the son, the conclusion follows that the testator was not laboring under a delusion which affected any of the provisions of the will: *Fulton v. Freeland*, 219 Mo. 494, 517 (118 S. W. 12, 18, 131 Am. St. Rep. 576); *Jackson v. Hardin*, 83 Mo. 175, 183; *Hall v. Perry*, 87 Me. 569 (33 Atl. 160, 47 Am. St. Rep. 352, 358).

It is true that the terms of the will fitted the position in which Charles Diggins was placed more closely than that of Leroy G. Isley. The nephew was younger than the stepson, who at the time of the execution of the will was nearly 21 years of age. Leroy G. Isley lived with his mother and stepfather, while they were living together, until about 1909, when he engaged in farming and stock-raising, and was so employed in March, 1912. It must be remembered, however, that Leroy G. Isley had been practically raised by David Diggins, and that the stepfather always thought a great deal of the stepson, spoke highly of him, and when conferring with his attorney about the disposition of his property, the testator stated that "he had a stepson that he had brought up himself, and he wanted to take care of him," while there is nothing to indicate that the deceased was particularly interested in Charles Diggins.

Much was claimed for what Thomas L. Diggins testified about what his father said concerning a check and Wes Isley. The statement was made, however, only a few days before the death of David Diggins, during the 10-day period when, according to the testimony of Dr. J. H. Thompson, he was not competent to transact business, and on an occasion when Thomas L. Diggins says he—

“found father out of his head. He did not know me when I first went in. He just looked up. I laid my hat [hat] down and was there a few minutes, and he looked up and apparently knew me.”

The record pictures an old man who was childish, whose memory was failing, and who was weakened by the infirmities of advanced age, but who, nevertheless, was firm in his convictions, and when he made his will understood the business in which he was engaged, had a knowledge of his property, and knew how he wished to dispose of it among those entitled to his bounty. The disputed writing reflects the deliberately expressed and carefully considered wishes of the testator unaffected by the wishes or influence of any other persons. The standard by which to measure the validity of the disputed writing is not what disposition of the property would have been made by most persons, or even by some others, but the test is as hereinbefore stated.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued May 3, affirmed May 25, 1915.

HEUEL v. WALLOWA COUNTY.

(149 Pac. 77.)

Statutes—Title—County Highways—Vacation.

1. Section 6279, L. O. L., authorizing the vacation of county roads and highways, is not repugnant to Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, the title of Laws of 1903, page 262, of which Section 6279 is a re-enactment, being "to provide for the laying out, establishing, constructing, improving, and relocating of county roads, for the establishment of road districts, the appointment of supervisors," etc., since the title of an act need not express all matters connected with the subject and embodied in the enactment, so long as it is fairly an index to the proposed legislation.

Statutes—Title—Amending Act—Constitutionality.

2. Section 6279, L. O. L., authorizing the vacation of county highways, a re-enactment of Laws of 1903, page 262, if repugnant to Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, was cured by Laws of 1913, page 296, entitled "An act to amend Section 6279 of L. O. L., relating to petitions, for road dedication and acceptance," since thereby the whole of the section amended served as a title to the law of 1913.

[As to sufficiency of title of amendatory act, see note in 86 Am. St. Rep. 267.]

Highways—Vacation—Statute.

3. Under Section 6279, L. O. L., providing for the vacation of county highways, and requiring that a petition for the laying out or vacating of such a highway shall specify the place of beginning, the intermediate points, and the place of termination, where the petition described the road to be vacated by name, and as beginning at its connection with another named road on a certain township line, 336 feet north of a certain corner of a subdivision of a given section in a given road district, thereafter giving the general direction of the highway, the sections over which it crossed, to where it connected with a specified public road, and there terminating, 40 rods west of a corner of a sectional subdivision, there was full compliance with the statute in respect to locating the road.

Highways—Vacation—Review of Proceedings—Presumptions—Findings.

4. Under Section 605, L. O. L., providing that a writ of review shall be allowed where an inferior tribunal appears to have exercised its judicial functions erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right of the plaintiff, where, on appeal from a decision of the Circuit Court dismissing such writ to re-examine the action of the County Court in vacating a highway, the

evidence which was before the County Court, as to the right of remonstrators to be counted as opposed to the vacation, was not incorporated in the record, the Supreme Court could not presume that the County Court erred in excluding them from consideration, as opposed to the vacation, since, the County Court having jurisdiction of the proceedings, the burden was on plaintiff seeking to have the proceedings set aside on writ of review to show that it erred or exceeded its jurisdiction, and also that such error injured some substantial right of the plaintiff, as required by the statute.

Highways—Vacation—Notice to Remonstrators—Statutes.

5. Under Section 6288, L. O. L., requiring the County Court to publicly read the report of the viewers, in proceedings to vacate a highway, on two different days of the same term, and then to proceed as indicated, where the petitioners filed a motion contesting the qualifications of certain signers of the remonstrance, it was not a prerequisite to a valid vacation that service of the motion be had upon the remonstrators or their attorneys before hearing, since a proper petition, accompanied by proof that the statutory notices have been posted, fulfills the requirements of law as to service of process in such proceedings, while to invalidate them for want of an additional notice of each step taken would render the road laws practically unenforceable.

From Wallowa: **JOHN W. KNOWLES**, Judge.

In Banc. Statement by **MR. JUSTICE BEAN**.

Peter Heuel, the plaintiff, obtained a writ of review to re-examine the action of the County Court of Wallowa County in the matter of vacating a county highway. The Circuit Court dismissed the writ, thereby affirming the proceedings of the County Court, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. A. M. Runnells* and *Mr. James A. Burleigh*.

For respondent there was a brief and an oral argument by *Mr. O. M. Corkins*, District Attorney.

MR. JUSTICE BEAN delivered the opinion of the court.

1, 2. It is maintained by counsel for plaintiff that the act of 1903 (Laws 1903, p. 262; L. O. L., § 6279), in so far as the same authorizes the vacation of county

roads and highways, is repugnant to Article IV, Section 20, of the state Constitution, which provides that:

“Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.”

This contention cannot be upheld. The act of 1903 was in effect, although not so expressed in the title, a revision or re-enactment of several sections of the road laws, for the purpose of publication in pamphlet form for distribution to road supervisors. In form the act repealed the old statute relating to the same matter. The title of the act assailed is as follows:

“To provide for laying out, establishing, constructing, improving, and relocating county roads; providing for the establishment of road districts and the appointment of supervisors therein, and prescribing their duties and compensation; providing for a board of county road viewers, and for the appointment of a county roadmaster, prescribing their duties and fixing their compensation; providing for the levy and collection of the general tax, and for the manner of expending the same; providing for the special improvement of county roads by district taxation, for holding district meetings, and prescribing the qualifications of voters at such meetings; providing for roads of public easement, and the manner of laying out and improving the same; providing for the construction and maintenance of roads, bridges and fences; providing penalties for violations of this act; fixing the compensation of surveyors and their helpers; and repealing,” etc.

It is contended that the matter of vacation of county roads is not expressed in the title of the act. The language of our fundamental law, “Every act shall embrace but one subject, and matters properly connected

therewith, which subject shall be expressed in the title," clearly indicates that it is not necessary for the title of an act to express all of the matters connected with the subject, and embodied in the enactment, otherwise the title would be practically a duplicate of the law itself. The vacation of a road and highway is undoubtedly connected with the subject mentioned in the title of the act in question. It cannot be said that this provision is wholly foreign to such subject. The title was a fair index to the proposed legislation. All of the provisions of the law are relevant to the subject. Therefore the act is not in conflict with the constitutional requirement: *Clemmensen v. Peterson*, 35 Or. 47 (56 Pac. 1015); *Corvallis & E. R. Co. v. Benson*, 61 Or. 359 (121 Pac. 418); *Bailey v. Benton County*, 61 Or. 390 (111 Pac. 376, 122 Pac. 755); *Eastman v. Jennings-McRae Logging Co.*, 69 Or. 1 (138 Pac. 216, 218); *Gantenbein v. West*, 74 Or. 334 (144 Pac. 1171, 1173). We enter into no extended discussion of this important subject for the reason that the proceedings reviewed were governed by the act of 1913 (Gen. Laws 1913, p. 296), amending the former act (Section 6279, L. O. L.); and, if there was any defect in the title to the earlier law, it was cured by the amendatory act. That is, the whole of the section amended served as a title to the later statute: *Pacific Milling & E. Co. v. Portland*, 65 Or. 349, 385 (133 Pac. 72, 46 L. R. A. (N. S.) 363); *Parks v. State*, 110 Ga. 760 (36 S. E. 73). The statute relating to county roads has been in existence since 1860, and during that time the legislature has not indicated an intention to change the law in respect to vacating county roads. The several enactments contain different language but are substantially to the same effect in this regard. Section 6279, L. O. L., requires that a petition for lay-

ing out or vacating a county road shall specify the place of beginning, the intermediate points, if any, and the place of termination of such road. It is argued by plaintiff's counsel that this requirement of the statute was not complied with. The petition describes the road proposed to be vacated by name, and as beginning where the same connects with another road named, on certain township line, 336 feet north of a certain corner of a subdivision of a given section in a given road district, then the general direction is given, the sections over which it crosses, to where the same connects with a public road "known as the Imnaha road," there terminating 40 rods west of a certain corner of a sectional subdivision.

3. The object of the petition and notice is to inform the people interested what road is asked to be vacated. The points of termini of the road described in the petition are specifically defined. The intermediate points are plainly delineated by describing the whole route of the road. The petition complies strictly with the statutory requirement. Proof of the posting of notice as directed by the statute was made, and is not questioned. Therefore the County Court acquired jurisdiction in the matter: *Ames v. Union County*, 17 Or. 600 (22 Pac. 118); *Feagins v. Wallowa County*, 62 Or. 186 (123 Pac. 902).

4. The next question for consideration arises as follows: The petition contained the names of 46 persons, 45 of whom the County Court found were qualified to sign the same. There were 65 signers to the remonstrance filed. Of these the court found that 38 were qualified remonstrators. After the report of the viewers was filed, the attorneys for the petitioners filed a motion contesting the qualifications of 8 of the remonstrators for the reason that the same persons

had signed the petition, and objecting to 10 as "not freeholders, nor owners of real property within road districts Nos. 5, 23 or 32, Wallowa County, Oregon, and therefore not qualified to sign said remonstrance," and 7 others for the reason they did not reside in either of the road districts through which the road passed. The County Court investigated the qualifications of the remonstrators, as well as of the petitioners, and made the findings above referred to, and decided that the remonstrance was not sufficient to overcome the petition. The petition for the writ of review alleges that the County Court erred in striking from the remonstrance the names of 7 signers thereon for the reason that said signers were not freeholders within either of the road districts in which the road is located. This seems to be the principal error relied upon. If conceded, this would, taken alone, add 7 more names to the remonstrance, making 45, which would equal the number of petitioners but would not outweigh the same. We pass this point.

The return to the writ discloses that the motion questioned the qualifications of these 7 remonstrators, as will be seen from the quotation above, on the ground that "said persons are not freeholders." The additional assertion in the motion as to the lack of ownership, by these signers, of property in the road districts, does not change the first challenge. This motion, however, is material only as indicating the reason of the ruling of the County Court, and on this account we have given the same due consideration. The record shows that the County Court excluded names, from both the remonstrance and the petition, that were not embraced in the motion. This indicates that the County Court did not base its decision entirely upon the ground specified in the motion.

Sections 6279 and 6288 prescribe that road petitions and remonstrances shall be signed by freeholders of the county residing in the road district or districts where the road affected is located. It is not essential that the real estate owned by such signatorial persons be situate in any particular road district or districts in the county. We note this as a preface to avoid any misunderstanding, and not because it is so contended by counsel for either side. The County Court having acquired jurisdiction of the road proceedings, as above noted, it is incumbent upon plaintiff in order to have the proceedings set aside upon a writ of review to show that the County Court erred in the exercise of its judicial functions or exceeded its jurisdiction, and also that such error was to the injury of some substantial right of the plaintiff: Section 605, L. O. L. In other words, error will not be presumed. And a mere irregularity in subsequent proceedings, after jurisdiction has once been obtained, will not vitiate the adjudication: *French-Glenn Co. v. Harney County*, 36 Or. 138 (58 Pac. 35); *Jensen v. Curry County*, 55 Or. 54 (105 Pac. 96).

The County Court in its inquiry as to whether or not the remonstrators were qualified to sign the same were referred, and had access, to the assessment-rolls and records of the county. No affidavit as to the qualification of the signers thereto accompanied the remonstrance. The return to the writ, which is the only evidence necessary to examine (*Curran v. State*, 53 Or. 154 [99 Pac. 420]), discloses that the County Court heard the matter and found as above stated. No request was made for more specific findings by either the County Court or the Circuit Court. The evidence before the County Court in regard to the remonstrators' right to be counted in the road matter

was not incorporated in the record in this action to review the road proceedings. The record of the rulings of that court does not show that any remonstrators were excluded, for the reason that their real estate was not situated in either of the road districts, or that the decision of the County Court was based upon any requirement as to signatures, except as provided by the statute. It is not shown by the record that the persons mentioned in the motion referred to, or those held not to be legal remonstrators, were freeholders of the county of Wallowa or elsewhere, or that they resided in either of the road districts. Therefore we cannot presume that the County Court erred in drawing its conclusion from the evidence which it had before it, but which is not before this court.

5. It is alleged that the County Court erred in proceeding with the hearing of the motion of the petitioners, and as to the legality of the signatures on the remonstrance without the service of the motion upon the remonstrators or their attorney. We do not find any record of the appearance of any attorney for the remonstrators prior to the filing of the motion. No appearance of an attorney for either side is noted in the County Court journal. All of the interested parties should have had ample opportunity to present their claims in the matter. However, no showing by affidavit or otherwise was made at any time to appraise the County Court that any of the parties had any further facts to present, or any request for any further hearing in the matter. The members of our County Courts are not all lawyers, and the same nicety as to rules of practice cannot be expected to prevail in that court as attorneys are accustomed to in the higher courts.

The remonstrance was filed on March 4, 1914. The report of the viewers is dated May 29, 1914. The County Court declared the road vacated July 6, 1914. Section 6288, L. O. L., requires the County Court to publicly read the report of the viewers in such a proceeding, on two different days of the same term, and then directs the court to proceed as therein indicated. We understand that the provision of the law, as to two separate proclamations of the report, is for the purpose of informing those particularly interested and the public generally of the action which is recommended, and that the road matter is under consideration by the court.

Any petitioner or remonstrator in a road case who does not care to rely solely upon the County Court can easily ascertain the time when the report will be read and the matter finally heard. A proper petition, accompanied by proof that the statutory notices have been posted, fulfills the requirements of the law as to service of process in such cases. And to invalidate road proceedings for want of an additional notice of each step taken therein by the court would render the road laws practically impossible of enforcement in case of any objection, and defeat their purpose. It was the duty of the County Court under the statute to ascertain the number of remonstrators, in the absence of any motion. Such motion would not necessarily change the mode of procedure. At the most the matter complained of as to want of notice was an irregularity, and did not nullify the action of the court.

The petition for the writ of review and the return made in obedience to the writ do not show an error to the injury of any substantial right of plaintiff.

Therefore the judgment of the Circuit Court affirming the action of the County Court is affirmed.

AFFIRMED.

Argued May 5, reversed May 25, 1915.

MADDEN v. CONDON NAT. BANK.

(149 Pac. 80.)

Appeal and Error—Presentation of Grounds of Review in Court Below—Necessity.

1. Improper argument of counsel cannot be reviewed where there was no exception below to the ruling of the court thereon.

Trover and Conversion—"Conversion"—What Constitutes.

2. Conversion consists in the exercise of dominion and control over property inconsistent with, and in denial of, the rights of the true owner or the party having the right to possession.

[As to what constitutes conversion of personal property, see notes in 15 Am. Dec. 151; 24 Am. St. Rep. 795.]

Trover and Conversion—Defenses.

3. It is a defense to an action for conversion that plaintiff was not damaged.

Trial—Instructions—Application to Issues.

4. In an action for the conversion of collateral security, where defendant alleged that the collateral was still in its possession undisposed of and subject to the conditions under which it was first disposed, an instruction that the question in the case was whether defendant was authorized to make the disposition of the security "admitted by all to have been made" was erroneous.

From Gilliam: DAVID R. PARKER, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by New Madden and E. L. Madden against the Condon National Bank, a corporation, for damages for the conversion of collateral securities. In 1909, according to the complaint, the plaintiffs were indebted to the defendant bank in the sum of \$4,000, evidenced by two promissory notes. For the purpose of securing the payment of this debt they delivered the

defendant three promissory notes, of the face value of \$2,000 each, which had been executed and delivered to the plaintiff New Madden in 1908. These collateral notes, maturing, respectively, four, five and six years after date, were secured by a mortgage upon 1,360 acres of land, and this mortgage was assigned to defendant; such transfer being signed by both plaintiffs, who are husband and wife. The agreement between plaintiffs and defendant was that defendant should collect the collateral notes and apply the proceeds first to the payment of plaintiff's debt, and deliver the overplus to them, and that, if defendant should collect only enough to satisfy plaintiff's debt, the collateral remaining should be returned to them; that the defendant, wrongfully and fraudulently, conspiring with the makers of the collateral securities, compromised and discharged the notes and mortgage for less than the face value, without notice to plaintiffs and without their consent.

Defendant in its answer admits the allegations relating to the indebtedness and the assignment of the collateral security, but denies that E. L. Madden had any ownership in the collateral notes and mortgage; denies the terms of the contract of assignment as set out in the complaint; denies all of the wrongful acts constituting the alleged conversion; and also denies that plaintiffs, before commencing this action, made demand for return of the securities, or that a return was refused. Defendant then affirmatively alleges that the plaintiff E. L. Madden signed the two notes first mentioned in the complaint as an accommodation maker; that the mortgage was subject and inferior to three other mortgages aggregating \$7,285, and accrued interest; that at the time of the assignment of the mortgage of defendant it was authorized to sell, assign, dis-

pose of, or satisfy the same and the notes thereby secured for such sums as, in the defendant's judgment, would be for the best interests of plaintiff New Madden and defendant, giving it full authority to satisfy said mortgage and notes to the same extent as if it were the owner thereof; that at the time of the assignment the fee-simple title to the mortgaged lands was vested in Arthur Madden and Nita Madden, and thereafter the said owners entered into a contract of sale with one Monahan agreeing to sell him a certain 560 acres of the land as described in such contract; that two of the superior mortgages were held by the State of Oregon, and the third one by one Hanley; that the latter mortgage was long overdue, and that Hanley was threatening a foreclosure; that in defendant's judgment a sale under foreclosure would not have realized enough to satisfy the three mortgages which are prior to the collateral lien; that plaintiff New Madden had not supplied defendant with any funds with which to take care of the prior liens, and, acting under the authority given it by the plaintiff New Madden, satisfied the mortgage, and, in lieu thereof, took a deed absolute in form, but intended as a mortgage covering all of section 10, township 4 south, range 22 east of the Willamette Meridian, which was a second mortgage thereon, subject only to a mortgage for \$2,450 in favor of the State of Oregon; that defendant did not cancel the collateral notes nor surrender them; that they are still in full force and effect, and are secured by said mortgage on section 10; that defendant still holds the three collateral notes and the mortgage on section 10 as security for the \$4,000 debt of plaintiff New Madden, and has been at all times ready, able and willing to transfer said notes and mortgage to said plaintiff upon his payment of the debt for which

they are held as security; that by reason of the fact that the lands were covered by three superior mortgages, and that Arthur and Nita Madden had contracted to sell a portion of said lands, it became necessary to release said mortgage and allow a conveyance to Monahan of the land contracted to him, the holders of the several mortgages taking new mortgages on separate and distinct parcels of the entire tract; that, as a result of such mutual agreement, 160 acres of land were conveyed to Hanley in satisfaction of his lien, and defendant took a second mortgage on section 10, subject only to the state's mortgage for \$2,450, in lieu of the collateral lien; that, if it had not entered into this mutual arrangement and satisfied the old mortgage, it would have lost all security for the Arthur and Nita Madden notes; that the plaintiff New Madden was cognizant of all the proceedings leading up to the aforesaid mutual arrangement; that he knew that defendant was joining in said negotiations, and was intending to release said mortgage and take in lieu thereof the second mortgage on section 10; that he made no objection thereto; that he acquiesced therein, and attempted to obtain the cash proceeds arising from the sale which would come, under the terms thereof, to defendant to be applied on said plaintiff's indebtedness; that by his acts and omissions he intentionally led defendant to believe that defendant was acting fully within the scope of its authority in substituting said mortgage on section 10 for the old mortgage on the entire tract, and defendant, relying thereon, made such substitution, which it would not have done but for such acts and omissions of said New Madden, and that he should now be estopped from denying defendant's authority so to do; that since said trans-

actions said New Madden has by word and action ratified the same.

A reply being filed, consisting of denials, a trial was had resulting in a verdict and judgment for plaintiffs, from which defendant appeals. REVERSED.

For appellant there was a brief over the names of *Mr. T. A. Weinke* and *Messrs. Angel & Fisher*, with an oral argument by *Mr. Weinke*.

For respondents there was a brief with oral arguments by *Mr. M. D. Shanks* and *Mr. Charles Horner*.

MR. JUSTICE BENSON delivered the opinion of the court.

Defendant's first assignment of error is that the trial court erred in denying its motion for a nonsuit. We need only to say that a careful examination of the plaintiff's testimony discloses sufficient evidence to justify a submission of the case to the jury, and the motion was properly denied.

1. Defendant assigns as error some improper remarks of counsel for plaintiff in his argument to the jury; but, while the remarks were unquestionably improper, there is no sufficient record of any exception to the ruling of the court, and therefore they cannot be considered here.

2, 3. The court gave the following instructions to the jury:

"Conversion consists in the exercise of dominion and control over property inconsistent with, and in denial of, the rights of the true owner, or the party having the right of possession. It is the exercise of such a claim or right or dominion over the property as assumes that he is entitled to the possession, or to deprive the party of it. The very assuming to

one's self the property and right of disposing of another man's goods is a conversion. The intent with which the wrongful act is done on the part of the defendant is not an essential element of the conversion. It is enough that the true owner has been deprived of his property by the unauthorized act of some person who assumes dominion or control over it. Any abuse of possession lawfully acquired, or any breach of the trust, under which the collateral security is placed, is a conversion. And it is a rule of law that the conversion of a part amounts to a conversion of the whole of a chattel when the circumstances show a purpose to control or dispose of the whole of it, or whenever the remaining part is thereby impaired in value or utility. And it matters not that it resulted in no profit or benefit to the defendant, or resulted in a benefit to the plaintiffs."

This instruction in a general way correctly states the law as to conversion, except as to the last sentence, which advises the jury that:

"It matters not that it resulted in no profit or benefit to the defendant or resulted in a benefit to the plaintiffs."

It is true that there are many authorities which sustain this doctrine, but we think that good reasoning and simple justice sustain the opposing line of cases whose reasoning is well expressed in the case of *Exeter Bank v. Gordon*, 8 N. H. 80, in the following language:

"There seems to be no reason to suppose that the compromise was not, on the whole, highly advantageous to the Gordons and the bank. And the complaint of this defendant is not that anything was, in fact, lost by it, but that it was made without authority. If the bank had wrongfully taken the note and converted it to their own use, they would have been answerable only for the value: [*Cortelyou v. Lansing*] 2 Caines' Cases, 215; [*Gray v. Portland Bank*] 3 Mass. 364 [3 Am. Dec. 156]; [*Rogers v. Crombie*] 4 Greenl.

[Me.] 274; [*Clowes v. Hawley*] 12 Johns. [N. Y.] 484; [*Clowes v. Hawley*, 2 B. & P. 451; [*Todd v. Crookshanks*] 3 Johns. [N. Y.] 432; [*Murray v. Burling*] 10 Johns. [N. Y.] 172; [*McLean v. Walk*, 10 Johns. [N. Y.] 471; 3 Starkie's Ev. 1503; 8 Taunton, 264; [*Ingalls v. Lord*, 1 Cow. [N. Y.] 240; [*Day v. Whitney*] 1 Pick. [Mass.] 503; [*Kingman v. Pierce*, 17 Mass. 247; [*Jones v. Farley*] 6 Greenl. [Me.] 226; 1 Barnw. & Adolphus 528; 1 C. & P. 625; [*Hussey v. Manufacturers' & Merchants' Bank*] 10 Pick. [Mass.] 415. And we are of opinion that, if the compromise in this case is, under the circumstances, to be considered as a wrongful disposition of the note, which was lawfully in the possession of the bank, it cannot and ought not to place the bank in a worse situation than it would have been, if the note had been wrongfully taken from the possession of the owner and converted to the use of the bank. It is said that this case is analogous to the case if an executor or administrator who compounds a debt due to the estate of the deceased for less than the amount. But how is the law in such a case? The general rule is that a release of a certain debt due to the testator makes it assets in the hands of the executor, because it shall be intended that he would not have made the release unless the money had been paid. And it seems to have been holden in former times that a release in such a case was conclusive evidence that the executor had received the money; and he was chargeable with the whole amount, although he might have received only a part: Lovelass on Wills, 48; [*Hooker v. Bancroft*] 4 Pick. [Mass.] 50; Wentworth's Executors, 70, 71, 158, 159; Comyn's Digest, 'Administration,' I, 1 and 2; Cro. Eliz. 43; T. Jones, 88; 2 Levintz, 189; [*Dawes v. Boylston*] 9 Mass. 352 [6 Am. Dec. 72]. But in modern times a more reasonable and equitable view of the subject seems to have been gaining ground. In many cases an executor can obtain nothing unless by way of compromise; and it is supposed that no court would now hold an executor liable for the whole debt in a case where he had, upon

a compromise on the whole advantageous to the estate, released the debt on receiving a part; for that would be to make him liable for the whole, merely because by his care and diligence he had been able to save a part: 2 Eq. Ca. Ab. 454, pl. 13; 3 P. Williams, 381; [*De Diemar v. Van Wagenen*] 7 Johns. [N. Y.] 411, 412. If, then, we follow that analogy in this case, we must hold that the bank is liable only for what it received, if the compromise was on the whole advantageous to all concerned."

In the recent case of *State v. West*, 74 Or. 112 (145 Pac. 15), this court has held that in an action for conversion no recovery can be had unless the plaintiff has actually suffered injury. The trial court therefore committed reversible error in giving this instruction. For the reasons above suggested, it was also error for the court to refuse the following requested instruction:

"I instruct you that, if you find that the defendant, without the consent of plaintiffs, exchanged securities, then before the plaintiffs can recover of the defendant they must have proven to you by a preponderance of the evidence that by such exchange they have been damaged."

4. Instruction No. 7 as given by the court is as follows:

"I instruct you that the material consideration for you, gentlemen of the jury, in this case is whether or not the Condon National Bank was authorized by New Madden and E. L. Madden to make the disposition of the pledged securities admitted by all to have been made, and whether or not the said New Madden and E. L. Madden afterward ratified the action of the bank. Either authorization before the transaction or ratification after the transaction, under such circumstances as would make you believe that authorization or ratification was definitely intended by the said New Madden and E. L. Madden, would be a defense."

It will be noted that the court uses the expression, "the disposition of the pledged securities admitted by all to have been made." An examination of the pleadings and the evidence discloses that it is not admitted by the defendant that any disposition of the collateral notes was made, but that, on the contrary they are still in its possession uncanceled, undisposed of and held subject to the conditions under which they were first deposited. It follows that the use of such language was clearly erroneous.

There are other assignments of error, but the views herein expressed sufficiently cover the material questions involved.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

Argued January 15, affirmed March 23, rehearing granted April 18, 1915.

Former opinion sustained on rehearing June 1, 1915.

BOHART v. PARKER.

(147 Pac. 188; 149 Pac. 85.)

Fraudulent Conveyances—Admissibility of Evidence.

1. A judgment creditor of a lessor of a farm levied on personal property on the farm loaned by the lessor to the lessee, and B. brought replevin against the sheriff claiming title to the property levied on under a transfer from the lessor. Defendant in replevin claimed that the transfer was made with the intent to defraud the judgment creditor. The lessee claimed no title to the property. *Held*, that the lease of the farm offered in evidence by plaintiff was immaterial and properly excluded.

Fraudulent Conveyances—Admissibility of Evidence.

2. In such case, a release by the lessee to the lessor of a part of the personal property so loaned was admissible as tending to show an effort to forestall the judgment creditor in the collection of his judgment.

Fraudulent Conveyances—Evidence—Notes.

3. In such action, where there was no dispute that certain notes were received by the lessor as part of the consideration for the property, such notes were properly excluded as immaterial.

Fraudulent Conveyances—Evidence—List of Property.

4. In such action, the exclusion of a list of all the property plaintiff purchased from the lessor, as being included in the complaint, as having been already testified to, and as immaterial, was proper.

Trial—Remark of Court—Harmless Error.

5. Where counsel was proceeding to argue a ruling on evidence as to the reputation of a witness, the court's remark that he would leave it to the jury was not prejudicial.

Appeal and Error—Review—Erroneous Reasoning.

6. An appellate court will affirm a correct decision of the trial court, though based on erroneous reasoning.

Replevin—Possession of Plaintiff.

7. Where plaintiff in replevin alleges in his reply that when he bought the goods they were in possession of a third person, and introduces a lease showing that such person had a right to possession until some time after suit brought, there can be no recovery, as plaintiff must be entitled to immediate possession.

Appeal and Error—Error Affecting Party not Entitled to Succeed.

8. Where plaintiff in replevin cannot recover because showing no right of immediate possession, he cannot complain of the action of the trial court in ordering a return of the property to one who had no right thereto.

From Lane: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action of replevin by W. A. Bohart against James C. Parker.

On April 8, 1913, one Francis recovered a judgment against Thienes in the sum of \$383.75. Execution was issued by virtue of said judgment, and on the 10th day of June, 1913, was levied by the defendant, who was sheriff of Lane County, upon certain personal property then claimed by plaintiff Bohart, by serving notice on A. M. Brewer, a lessee of said Thienes, and attaching certain personal property. Brewer answered that he had in his possession certain property in which Thienes claimed some right or interest, being the property

sued for. Thereafter the defendant duly advertised the same for sale to the extent of the interest had therein by said W. C. Thienes. It is further alleged that the transfer of said property was without consideration or change of possession and was made with intent to hinder, delay and defraud the creditors of Thienes, especially the said Francis in the collection of his judgment. It is admitted that Thienes had an interest in said property prior to June 3, 1913. The action was tried before a jury, which returned a verdict for defendant. From the judgment entered thereon plaintiff appeals.

AFFIRMED. OPINION SUSTAINED ON REHEARING.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery*.

For respondent there was a brief and an oral argument by *Mr. Fred E. Smith*.

MR. JUSTICE EAKIN delivered the opinion of the court.

At the time of the levy the goods were in possession of A. M. Brewer. Plaintiff claims that he bought the property of Thienes on the 3d day of June, 1913.

1. The first assignment of error relates to the refusal of the court to admit in evidence exhibit "B," being the lease of the farm by Thienes to Brewer, which we deem immaterial. The only purpose of the offer was to show by what arrangement Thienes left the property in question with Brewer. Plaintiff claims to have acquired the property from Thienes, and Thienes' title is not questioned.

2. The second assignment is directed against the reception in evidence of exhibit 1, but it was not prejudicial to the case. Brewer's title to the property is

not in question, and the exhibit relates to the release by him of part of the stock to Thienes, and evinces that Thienes and Brewer were expecting trouble or litigation with Francis. It was competent tending to show an effort to forestall Francis as to the title to the stock, which had been retained by him until full payment should be made.

3. As to the exclusion of exhibits "C" and "D," the court held that the fact evidenced by the notes was admitted, that there was no dispute about it, and that they were received by Thienes as part of the consideration for the property. The objection was properly sustained on the ground that the exhibits were immaterial. The court excluded exhibit "F" as immaterial, saying:

"The witness has stated previously what the business relations between him and Mr. Bohart were. I will let the matter rest there. If the defense justifies it you will be afforded the opportunity on rebuttal to go into the matter."

It does not appear that plaintiff was prejudiced by their exclusion.

4. The refusal of the court to receive in evidence exhibit "G," which was a list of all the personal property Bohart purchased from Thienes, is assigned as error. The court ruled that it was included in the complaint, had already been testified to, and was immaterial. Said assignment is not well taken.

5. As to assignment No. 8, the reputation of a witness was being discussed, and the court said he would leave that matter to the jury. Counsel was proceeding to argue with the court as to such ruling when the remark was made in answer to argument of counsel, and was not prejudicial.

The motion of defendant for a directed verdict was properly refused. The questions presented by the evidence were for the jury to decide. We find no error in the record, and the judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BEAN concur.

Former opinion sustained on rehearing June 1, 1915.

ON REHEARING.

(149 Pac. 85.)

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action in regular form for the recovery of the possession of personal property. Except as otherwise admitted, the answer denies the whole complaint, and alleges, in substance, that the defendant, as sheriff, received an execution regularly issued on a valid judgment of the Circuit Court against W. C. Thienes, who at the time was the owner of a leviabie interest in the property in question which was then in the actual possession of one Brewer. Armed with this writ, the defendant says he levied upon the chattels in Brewer's custody by serving upon him the statutory notice, in response to which the latter answered that he had possession of the goods; that the execution debtor claimed some interest in them, but that the garnishee, Brewer, claimed a lien upon them for the payment of an amount of money named. The answer then avers that the defendant advertised for sale the interest of Thienes in the property, at which juncture this action was com-

menced, and that the events narrated in the answer constitute the grievance of the plaintiff mentioned in the complaint. A further answer charges that Thienes had transferred the chattels to plaintiff with intent to hinder, delay and defraud the creditors of the seller, of which fraudulent purpose the plaintiff had full knowledge and in which he participated. After certain admissions and denials, the reply alleges that the plaintiff bought the property from Thienes and that at the time it was in possession of Brewer; but does not state anything challenging the rightfulness of Brewer's custody, nor give any reason why it should be disregarded. At the close of the plaintiff's case, on motion of the defendant, the court directed a verdict for him awarding him a return of the property. The bill of exceptions shows the court gave as its reason in effect that there was no testimony to show that the defendant had possession of the property at the commencement of the action. From the consequent judgment, the plaintiff appeals.

FORMER OPINION SUSTAINED.

For appellant there was an oral argument on rehearing by *Mr. H. E. Slattery*.

For respondent there was an oral argument on rehearing by *Mr. J. F. Brumbaugh*.

MR. JUSTICE BURNETT delivered the opinion of the court.

6. In *Pennoyer v. Neff*, 95 U. S. 714 (24 L. Ed. 565), Mr. Justice FIELD said:

"If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision."

Then stating the contentions before that tribunal, he continued:

"If these positions are sound, the ruling of the * * court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made."

On the rehearing of this case, we find ourselves in a similar situation in respect to the decision under review. While we are unable to approve the reason given for the ruling of the trial judge, yet, as we shall endeavor to show, his conclusion was correct and must be affirmed.

7. It is axiomatic that the plaintiff in replevin must be entitled to the immediate possession of the goods involved at the commencement of the action. This, indeed, appears by the averments of the complaint and is traversed by the answer. The latter pleading, however, discloses that the possession was in Brewer. The reply, essaying to give plaintiff's chain of title to the chattels, says the plaintiff purchased them from Thienes, but that when he bought they were in the possession of Brewer. We must presume that Brewer's holding was rightful. The pleadings disclose nothing to the contrary, and the plaintiff, having portrayed that condition, must show that custody was wrongful if he would work out the result that the claim of the defendant, deraigned from Brewer as to mere possession, is likewise wrongful.

Nor is the case of plaintiff aided if we look into the lease from Thienes to Brewer, which plaintiff says was erroneously excluded from the consideration of the jury. Passing the objection to the actual paper offered that it is a statement of the substance of an original lease, not admissible because the showing of diligent search for the prototype is not sufficient, we

learn from the document that on October 12, 1912, Thienes leased his ranch and stock to Brewer for three years; the tenant to give possession after one year in case of sale of the premises. It seems that the property here in question is part of the stock included in that lease. At any rate, that appears to be the contention of the plaintiff. This action was commenced June 17, 1913. According to the paper offered, Brewer's right to the possession would not have terminated under any circumstances until October 12, 1913, or about four months after the beginning of the action. These conditions disclosed by the record were pressed upon our attention on rehearing and are potent in behalf of the defendant. The plaintiff's reply and the evidence he offers undermine his complaint and work out its downfall.

8. The plaintiff criticises the directed verdict, in that it awards to the defendant a return of the property, although the court gave as a reason that there was no evidence to show he ever had possessed it. The argument is that, if the defendant never had the chattels, it was wrong to return them to him. The form of verdict does not concern the plaintiff under the situation where he himself shows lawful possession in a third party. Unless he reveals present right in himself to the custody of the goods in suit, his action must fail, and that is the end of the whole matter for him. He must recover on the strength of his own right to possession. The conclusion is that, while the reason given for the directed verdict may have been faulty, yet the result was right, as apparent from the record, and must be affirmed.

FORMER OPINION SUSTAINED ON REHEARING.

MR. JUSTICE HARRIS took no part in the consideration of this case.

Argued March 31, modified April 27, objection to cost bill overruled June 1, 1915.

HENDERSON v. TILLAMOOK HOTEL CO.

(148 Pac. 57; 149 Pac. 473.)

Appeal and Error—Review—Equity Cases.

1. An equity suit is triable *de novo* on appeal; and hence the disqualification of the trial judge will not prevent the appellate court from reviewing the case.

Judges—Disqualification—Interest.

2. Where, two days before commencement of the suit, the trial judge sold his stock in the defendant corporation to plaintiff, he was not technically disqualified by interest, within Section 956, L. O. L.; but it would be preferable for him not to hear the case.

Injunction—Bonds—Necessity.

3. Under Section 417, L. O. L., providing that before allowing an injunction the court shall require of plaintiff an undertaking with sureties, an injunction should not be granted on the court's own motion, unless plaintiff gives the required undertaking.

Corporations—Receivers—Appointment—Right to.

4. Though accountants appointed to audit books of a corporation were agreed to by the defendant officers, the wrongful refusal of such officers to compensate them is no ground for appointment of a receiver of the corporation.

[As to grounds for appointment of receiver, see notes in 64 Am. Dec. 482; 72 Am. St. Rep. 29.]

Corporations—Receivers—Appointment—Grounds.

5. Where the patronage of an hotel had been practically the same since it started in business, the directors and managers should not be removed and a receiver appointed, even though the conduct of the president, who was in active charge of the business, had been open to criticism on account of his intoxication; it not appearing that the corporation was in immediate danger of insolvency, or that the president was falsifying or failing to keep records of its business.

Corporations—Use of Corporate Property—Power of President.

6. The president and manager of an hotel corporation should not use the liquor of the company or its funds in treating himself, guests and others, though he justified it on the ground of advertising.

Costs—Costs on Appeal—Suits in Equity—Transcript.

7. The Supreme Court will tax as a disbursement the necessary expense incurred for a transcript of the testimony in a suit in equity, when such transcript is prepared for the appeal, and after a decision by the trial court.

From Tillamook: WEBSTER HOLMES, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a suit by John Leland Henderson against the Tillamook Hotel Company, P. J. Worrall, Anna A. Worrall and Charles Kunze.

The real purpose of this suit, which was commenced January 16, 1914, is to oust P. J. Worrall from the management of an hotel owned by the Tillamook Hotel Company, a corporation, which was organized for the purpose of building the hotel. The capital stock aggregated \$33,000, divided into 330 shares of the par value of \$100 per share, of which \$32,500 is subscribed and paid for. The defendants P. J. Worrall and Anna A. Worrall are husband and wife, the former owning 86 shares and the latter 85 shares of the capital stock. The defendant Charles Kunze owns 10 shares and the plaintiff has one share of the capital stock. At the time of the commencement of the suit the defendants P. J. Worrall, Anna A. Worrall and Charles Kunze constituted the board of directors of the Tillamook Hotel Company. The officers of the company are P. J. Worrall, president; Anna A. Worrall, vice-president; N. W. Harrison, treasurer, and Hazel Worrall, a daughter of P. J. Worrall, secretary. The by-laws of the corporation designate the president as general manager, and authorize him to transact all of the business of the company, to buy supplies and materials, to employ help and labor, and generally to conduct the business of the company. The ground and building cost about \$39,500, and the additional sum of about \$10,000 was expended for furnishings. The hotel was opened to the public July 19, 1913, under the management of the officers mentioned. The amended complaint alleges and the answer admits that the directors voted salaries to be paid as follows: To P. J. Worrall,

as president and manager, \$100 per month; to Anna A. Worrall, as housekeeper, \$35 per month; and to Hazel Worrall, as secretary, \$25 per month. The stock subscriptions not being sufficient to complete and equip the building, the directors borrowed \$10,000 from the Equitable Loan & Savings Association, which sum is agreed to be repaid in monthly installments of \$216.40. P. J. Worrall and Anna A. Worrall also loaned the company the sum of \$6,500, and the corporation owes the further sum of about \$4,000.

The grievances of the plaintiff, as we find them narrated in the amended complaint, are, in substance, that P. J. Worrall has been habitually in a condition of gross intoxication; that he has been guilty of boisterous and brawling conduct in and about the hotel; that he has frequently used loud and abusive language, regardless of the presence of guests of the hotel; that on one occasion, and without cause, he cursed and abused the plaintiff, who was at the time a guest of the hotel; that he has engaged in altercations and personal encounters with designated persons in and about the hotel; that by reason of such conduct Worrall has acquired the reputation of being a dangerous, quarrelsome and disagreeable man, and on account thereof the hotel has acquired the reputation of being an undesirable place for the traveling public to patronize, in consequence of all of which the business has been permanently impaired, to the financial loss and injury of the stockholders. The amended complaint further charges that on account of the incompetence of Worrall and his gross mismanagement the business is being operated at a loss of \$300 per month, but that the hotel could be conducted at a profit if properly managed. The plaintiff asserts that the property could be leased for probably \$400 per month, which would afford a

reasonable return to the stockholders, but the defendant P. J. Worrall refuses to lease the hotel, except for the exorbitant rental of \$600 per month; that P. J. Worrall fails to keep books of account correctly showing the business of the company; that he has converted to his own use both money and property of the company, and especially large quantities of liquor; that by reason of his gross mismanagement the stock has so depreciated that it cannot be sold for 30 cents on the dollar, and that it will become further depreciated if the present management is continued; that Anna A. Worrall is dominated by P. J. Worrall, so that for all practical purposes the management is vested in P. J. Worrall. The plaintiff also charges that the defendant P. J. Worrall intends to render the company insolvent, thereby enabling him to purchase the stock for only a fractional part of the par value thereof; that it is impossible to know the exact condition of the affairs of the company because of the manner in which the books have been kept; that the company is either insolvent or in immediate danger of insolvency. The amended complaint concludes with a prayer that a receiver be appointed for the property and business of the company; that during the pendency of the suit and until the further order of the court the defendants be enjoined from in any way transacting any business as directors of the company; that defendants be required to account for all property and funds received by them, and to pay the same to a receiver to be appointed by the court; that, if necessary to do equity, the whole of the property be sold, and the proceeds paid to the creditors and the stockholders.

The defendants deny the charge of mismanagement, and affirmatively allege that from the time that the hotel was opened until December, 1913, the business

was conducted at a profit, except during the months of December and January, when there was a loss; that the plaintiff, who is not financially responsible, has conspired with certain minority stockholders to deprive the Worralls of the money invested by the latter, and in furtherance of such conspiracy instituted this suit.

The court without any bond being given, and upon the *ex parte* application of plaintiff, issued a restraining order on January 16, 1914, enjoining the defendants from encumbering the property or incurring any indebtedness, or in any way acting for it, except to keep the hotel open for business, and directed defendants to appear on January 20th and show cause why such order should not be continued during the pendency of the suit.

On January 22, 1914, the defendants were enjoined from in any manner encumbering any of the property and from creating any indebtedness without the leave of the court; from appropriating or using any of the property, except board and lodging for P. J. Worrall, Anna A. Worrall and Hazel Worrall. The court directed P. J. Worrall to render an accounting of all moneys received, and enjoined the defendants from drawing any salary until the further order of the court.

On January 22, 1914, the court appointed A. H. Gaylord and C. J. Carlton accountants to expert the books, fixed their compensation at \$7.50 per day, ordered Gaylord upon completion of the work to continue to keep the book accounts, his compensation to be fixed thereafter; and on January 27th the court made a further order commanding the defendants to pay Gaylord and Carlton for services rendered pursuant to the order of January 22d, and, if sufficient funds were not on hand,

then defendants were authorized to borrow money to make the payment.

The defendants on February 7, 1914, filed a motion to dissolve the restraining orders, for the reason that plaintiff had not filed an undertaking as required by law, and thereafter on February 10th, the court directed the plaintiff to file an undertaking in the sum of \$500.

The next order was made on May 1, 1914, at which time the court peremptorily directed the defendants to pay Gaylord and Carlton for their services as accountants. Thereafter, on May 5th, after reciting that the application of plaintiff for a receiver made January 22d was continued from day to day, that by agreement of all the parties the court appointed Gaylord and Carlton as accountants to expert the books at the rate of \$7.50 per day, which compensation was agreed upon by all the parties and their counsel in open court, that defendants failed to pay the accountants as ordered, that P. J. Worrall is not a suitable person to be in control of the property, and ignores the orders of the court, an order was made appointing A. H. Gaylord receiver, with authority to take immediate and exclusive possession of the hotel property and business, and manage the same according to the orders of the court, and to pay the claims of Gaylord and Carlton. The last-mentioned order permitted the individual defendants to remain in the hotel as guests, but enjoined them from interfering with the management of the business.

The defendants having refused to surrender possession to Gaylord, the court, on May 5th, made an additional order directing the sheriff to place Gaylord in possession; and on the following day, upon application of the receiver, the court ordered that P. J. Worrall

and Anna A. Worrall be not permitted to remain in the hotel as guests or otherwise, and the sheriff was directed to eject them. The suit resulted in a decree whereby the individual defendants are enjoined from managing the affairs of the company and from drawing or claiming salaries since May 5, 1914; A. H. Gaylord was appointed receiver to operate the business and to take the necessary steps to procure sufficient funds to pay the running expenses, as well as all other indebtedness, and to borrow money for that purpose; and the company was awarded judgment for \$559 against P. J. Worrall on account of liquors consumed. The defendants appeal. MODIFIED.

For appellants there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. E. J. Claussen*, with an oral argument by *Mr. Duniway*.

For respondent there was a brief over the names of *Mr. H. T. Botts*, *Mr. George R. Bagley* and *Mr. Edmund B. Tongue*, with an oral argument by *Mr. Botts*.

MR. JUSTICE HARRIS delivered the opinion of the court.

It is claimed that the circuit judge was disqualified, and that he should have declined to preside at the trial. In support of their contention the defendants point to the fact that on January 22, 1914, they filed a motion to secure a ruling on the alleged disqualification of the presiding judge; the motion being accompanied by affidavits to the effect that he was a party in interest. It appears from the record that the trial judge had subscribed for one share of the capital stock of the defendant corporation; that his subscription had not been fully paid; and that on January 14, 1914, two

days before the commencement of the suit, he sold all his interest in the stock subscription to the plaintiff, Henderson, who on January 21st following paid to the company the balance due on the subscription.

1. Being a suit in equity, this cause is tried *de novo* in this court on the entire record as made by the parties in the *nisi prius* court. The litigated questions are decided here on the facts as we learn them from the evidence and the admissions made in the pleadings. The question of the alleged disqualification of the circuit judge is neither a persuasive nor a determinative factor in the conclusion to be reached by this court on the merits of the dispute between the plaintiff and the defendants. The appellate tribunal is not prevented from deciding this cause on the record brought here, even though it be conceded that the circuit judge was disqualified.

2. While the objection raised by the defendants is not an element of the case calling for decision here, we note, however, in passing, that although a technical disqualification was not shown to exist within the contemplation of Section 956, L. O. L., because all right to the share of stock subscribed for had passed to the hands of another person, who had paid the balance due on the stock subscription at the time of filing the motion, nevertheless, under the circumstances, it would have been more in keeping with prudence and a fine sense of impartiality if the presiding judge had declined to try the suit.

3. The defendants complain because an injunction was issued without an undertaking being given or required. Neither the restraining order made on January 16, 1914, nor the one issued on January 22d provided for the giving of an undertaking, and none was required until February 10th. Even though the re-

straining order was made by the judge, upon his own motion, as stated in the order dated February 10, 1914, nevertheless the statute required the giving of an undertaking. We read in Section 417, L. O. L., that:

“An injunction may be allowed by the court, or judge thereof, at any time after the commencement of the suit and before decree. Before allowing the same, the court or judge shall require of the plaintiff an undertaking, with one or more sureties.”

The terms of the statute are imperative, and command the court or judge to require an undertaking before allowing an injunction *pendente lite*.

4. The appointment of a receiver made by the court on May 5, 1914, is questioned by defendants. The record discloses that on January 17, 1914, the plaintiff filed a motion for the appointment of a receiver. The motion and the accompanying affidavits were served on the individual defendants on January 17th, together with a notice that the motion would be presented on January 20th. From all that appears in the record the application for a receiver was not presented on the date designated, and the next step seems to have been taken on January 22d, when defendants filed affidavits in support of their claim that the presiding judge was disqualified. A restraining order was issued, and the accountants were appointed on January 22d. On January 27th an order was made directing the defendants to pay the accountants, and, if need be, to borrow money to make such payments. The defendants on February 7th moved to dissolve the restraining orders, and thereafter, on February 10th, the plaintiff was directed to file an undertaking in the sum of \$500 on account of the issuance of the injunction. Not having paid the accountants, an order was made by the court on May 1st, commanding the defend-

ants forthwith to procure funds by loan or otherwise and deposit the same with the clerk of the court for the use and benefit of the accountants. The defendants having refused to comply with the last-mentioned order, the court, on May 5th, appointed a receiver. It clearly appears from all that transpired and from the recitals contained in the different orders that the appointment was prompted by the refusal of the defendants to pay the accountants, and that this was the controlling feature causing the appointment. The affairs of the Tillamook Hotel Company on May 5th were not in a worse condition than on January 22d. The refusal of the defendants to pay the accountants in obedience to the orders of the court did not furnish ground for a receivership. Under all the circumstances, as we read the history of the litigation, a receiver should not have been appointed. It is proper to add, however, that from a careful examination of the record we find that the appointment of the accountants was made under conditions which warrant the conclusion that both plaintiff and defendants sanctioned the selection of the accountants and approved the amount of the compensation fixed by the court; and, in view of the circumstances stated, the corporation should have paid Gaylord and Carlton.

5. The main grievance of plaintiff is that P. J. Worrall, by reason of his conduct, has acquired the reputation of being a quarrelsome, dangerous and disagreeable man, and, on account thereof, the hotel lost much patronage. We gather from the evidence that the hotel in question is better furnished and equipped than any other one in Tillamook. If any loss of patronage could properly be traced to Worrall, at least some information would be afforded by the hotel register. The company commenced business July 18, 1913, and the

number of guests registering during that month was 142, and during the subsequent months as follows: August, 815; September, 377; October, 382; November, 444; December, 320; January, 90; February, 298; March, 363; April, 357; and the first four days in May, 35. Nearly all the persons who registered were assigned rooms, but some guests took meals only. It will be observed that, with the exception of August and January, the patronage was practically the same. The business done in January is accounted for by the fact that the train service was tied up nearly all of that month. No doubt, Worrall's conduct, which was not at all times exemplary, gave rise to some discussion, but the conditions are not sufficiently grave to warrant the court in removing him from the management of the business, especially in view of the fact that Worrall and his wife have invested \$17,100 of their money in the property, and have loaned the corporation the additional sum of \$6,500. The evidence does not warrant the claim that P. J. Worrall is seeking by fraudulent or other means to depreciate the value of the stock. Although books of account were not kept with as much care and completeness as might be desired, still the plan employed afforded means of knowing how much was received from the dining-room, the rooms and the bar; and the disbursements were evidenced by checks.

The final decree, in effect, removed the directors and officers of the corporation, and placed the management in the hands of a person selected by the court. Assuming that a court of equity does have the power to remove the officers of a corporation and substitute a managing receiver, or even to decree the dissolution of the corporation, nevertheless it is a well-settled rule that such court will proceed with extreme caution in

the appointment of receivers over corporate bodies: High on Receivers (4 ed.), § 292. The financial statement made on February 14, 1914, shows that the loss up to that time aggregated \$828.14. A subsequent report was made by A. H. Gaylord showing that the receipts between January 24, 1914, and April 30th following amounted to \$6,088.25; and the monthly overhead expense, including light, water, fuel, telephone, laundry, rent, taxes, salaries of employees, the installments paid to the Equitable Loan & Savings Association and the National Cash Register Company, was \$1,141.65. When the receiver was appointed *pendente lite* the corporation was a going business concern, and was neither insolvent nor in such imminent danger of insolvency as to warrant the appointment of a receiver. The evidence does not disclose any material change in conditions when on June 19th the final decree was rendered: *Sabin v. Columbia Fuel Co.*, 25 Or. 15 (34 Pac. 692, 35 Pac. 854, 42 Am. St. Rep. 756). Minority stockholders are entitled to protection against fraud or gross and reckless mismanagement on the part of the officers of a private corporation; but, under the evidence, the instant case does not afford an illustration of fraud, and no such mismanagement has been shown as to warrant a court to adopt the extreme measure of taking complete charge of the business and conducting it through a receiver.

6. The defendant P. J. Worrall was in the habit of using liquor owned by the company, and also made a practice of liberally treating patrons of the hotel bar at the expense of the corporation; and on other occasions he used the money and liquor of the corporation for the entertainment of himself and friends, although he contends that it was done for advertising purposes. He cannot use or give away property of the company

in the manner indicated, and should be enjoined from doing so in the future. While it is impossible to determine with exactness the amount of money and liquor so used and consumed, still we think that \$250 will fairly reimburse the company, and therefore the defendant Tillamook Hotel Company is awarded a judgment against P. J. Worrall for that sum.

While the appeal was pending the receiver filed a report and the findings made therein by the trial court are here for review on a separate appeal, and consequently the question of the costs of the receivership will be reserved for determination hereafter.

This suit is dismissed as to the defendants Anna A. Worrall and Charles Kunze; the receiver is directed to turn over to the officers of the corporation all the property in his hands belonging to the Tillamook Hotel Company; the defendants P. J. Worrall, Anna A. Worrall and Charles Kunze are granted judgment against plaintiff for costs and disbursements in this court; but neither plaintiff nor defendants shall have judgment for the costs and disbursements of suit incurred in the Circuit Court. The decree of the Circuit Court should be modified in conformity with this opinion; and it is so ordered.

MODIFIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN concur.

Overruled June 1, 1915.

ON MOTION TO RETAX COSTS.

(149 Pac. 473.)

The respondent objects to some of the disbursements claimed by appellants in their cost bill, and files motion to retax costs.

MOTION OVERRULED.

Mr. H. T. Botts, Mr. Geo. R. Bagley and Mr. Edmund B. Tongue, for the motion.

Mr. Ralph R. Duniway and Mr. E. J. Claussen, contra.

Department 2. MR. JUSTICE HARRIS delivered the opinion of the court.

This is a motion to retax costs. The decree awarded to the appellants their costs and disbursements in this court. The cost bill contains an item of \$261 paid to the official stenographer for transcribing the testimony after the trial court had decided the cause in order that the testimony might be included as a part of the transcript on appeal. The plaintiff objects to the item mentioned, and claims that it cannot be taxed as a disbursement in the Supreme Court, but is taxable in the Circuit Court only.

7. Referring to the practice in law actions, this court has held in *De Vall v. De Vall*, 57 Or. 128 (109 Pac. 755, 110 Pac. 705), that:

“It is settled that in a law action the sums of money paid by a party to the official reporter as his legal fees must be taxed in the lower court and cannot be entered here as a disbursement.”

See, also, *Allen v. Standard Box & Lumber Co.*, 53 Or. 10, 18 (96 Pac. 1109, 97 Pac. 555, 98 Pac. 509); *Sommer v. Compton*, 53 Or. 341 (100 Pac. 289); *McGee v. Beckley*, 54 Or. 250, 254 (102 Pac. 303, 103 Pac. 61); *West v. McDonald*, 64 Or. 203 (127 Pac. 784, 128 Pac. 818); *Heywood v. Doernbecher Mfg. Co.*, 48 Or. 359, 371 (86 Pac. 357, 87 Pac. 530); *Boothe v. Farmers & Traders' Nat. Bank*, 53 Or. 576, 589 (98 Pac. 509, 101 Pac. 390). In a suit in equity, however, the fees paid to the official stenographer for transcribing the testi-

mony may be taxed as a disbursement in this court. The cause is tried *de novo* if it be a suit in equity. The disbursement objected to was for a transcript which was not used by the trial court. The expense of preparing a transcript of the testimony in a suit in equity for the use of the Circuit Court before a decision of the cause is taxable in the Circuit Court, because it is in fact a disbursement made for the trial in that court; and the cost of such transcript is not taxable in this court under the rule announced in *Albert v. Salem*, 39 Or. 466, 480 (65 Pac. 1068, 66 Pac. 233). If, however, a transcript of the testimony in a suit in equity is not prepared until after a decree by the trial court and is made only for the purpose of the appeal, then the expense of such transcript is properly taxable in this court. The question involved in the objection made by plaintiff was determined in *Young v. Hughes*, 39 Or. 586, 597 (65 Pac. 987, 66 Pac. 272):

“The stenographer’s notes of the testimony not having been transcribed when the decree was rendered in the lower court, it was necessary that a transcript thereof should be made, in order that the cause might be tried *de novo* in this court; and, it appearing from the amended verified statement that the sum of \$40 paid therefor is reasonable, it is allowed.”

In *Litherland v. Cohn Real Estate Co.*, 54 Or. 71, 76 (100 Pac. 1, 102 Pac. 303), a like disbursement was taxed after making certain deductions from the cost of the brief and abstract and disallowing the expense of a carbon copy of the evidence. Since the decision made in *Young v. Hughes*, 39 Or. 586, 597 (65 Pac. 987, 66 Pac. 272), the practice in this court has been to tax as a disbursement the necessary expense incurred for a transcript of the testimony in a suit in equity when such transcript is prepared for the appeal and after a

decision by the trial court. The objection to the cost bill is overruled. MOTION OVERRULED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN CONCUR.

Argued May 7, affirmed June 1, 1915.

HOBSON v. O'CONNOR.

(149 Pac. 83.)

Appeal and Error—Record—Authentication—Sufficiency.

1. A transcript purporting to be a rehearsal of the proceedings at trial, certified only by the official reporter and not even in the form for a bill of exceptions, cannot be considered on appeal.

From Malheur: DALTON BIGGS, Judge.

This is an action by S. A. Hobson against Florence O'Connor and J. O'Connor, in which the plaintiff recovered a judgment and defendant appeals. The facts are set forth in the opinion of the court.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. William E. Lees*.

For respondent there was a brief and an oral argument by *Mr. C. McGonagill*.

Opinion PER CURIAM.

This is an action to recover the possession of what the parties treated in their contract as personal property. The plaintiff and the defendant Florence O'Connor entered into an agreement in writing, whereby the former agreed to sell to the latter what

they termed fixtures and personal property; among other things, "one (1) brick one-story building and appurtenances located on the property belonging to Frank Welch situated at the southeast corner of Oregon Street and Washington Avenue, Ontario," retaining title to the property until the purchase price was fully paid in installments apportioned by the agreement. The right to recover is predicated upon the alleged failure of the purchaser named in the contract of conditional sale to liquidate the unpaid balance of the purchase price.

The defendant claims, in substance, that the title to the building failed, in that there was no agreement whereby the plaintiff might remove the same from the premises of Welch. Various questions are urged in the briefs of the parties, but we are unable to consider them for want of a bill of exceptions. Accompanying the transcript is what purports to be a rehearsal of the proceedings at the trial certified by Wm. M. Walker, official reporter; but it is not in any way authenticated by the judge who presided at the trial. It is not even in the form prescribed by the statute for a bill of exceptions, and hence we cannot consider any of the objections urged.

The judgment of the Circuit Court must therefore be affirmed.

AFFIRMED.

Argued May 5, reversed June 1, 1915.

STATE v. MOYER.

(149 Pac. 84.)

Arson—Offenses—Essentials.

1. Under Section 1932, L. O. L., declaring that if any person shall willfully and maliciously burn, in the night-time, any barn of another, he shall be guilty of arson, the indictment must allege the owner of the barn as part of the description of the offense.

[As to ownership of property burned as affecting crime of arson, see note in Ann. Cas. 1912A, 1126.]

Indictment and Information—Amendments—Defects in Form.

2. Under Article VII, Section 18, of the Constitution, providing that any district attorney may file an amended indictment, whenever an indictment has been held defective in form, an indictment charging the arson of a barn, which did not describe the owner, cannot be amended so as to supply the defect, for the allegation of ownership is an essential to the offense, and so is not a mere formal allegation, but is matter of substance that must be proved.

[As to constitutionality of statute permitting amendment of indictment, see note in Ann. Cas. 1913A, 402.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

The defendant, George F. Moyer, was indicted for the crime of setting fire to and burning a stable. The portion of the indictment important here is as follows:

“The said Geo. F. Moyer, on the 21st day of March, 1914, * * did then and there wrongfully, unlawfully, feloniously, willfully and maliciously, in the night-time, set fire to and burn a stable, to wit, the Jordan Valley Livery-stable. * * ”

To this indictment the defendant demurred, for the reason that it did not state facts sufficient to constitute a crime. The court, after argument, sustained said demurrer, and allowed the district attorney to amend the indictment without submitting the matter to another grand jury; such permission being authorized

by Section 18, Article VII, of the Constitution, as amended in June, 1908, by the clause:

"Provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form."

Section 18 of Article VII of the Constitution originally provided:

"The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury."

The defendant filed a motion asking an order of the court directing that the amendment be not allowed, and that the indictment be quashed for the reason that it had not been returned by any grand jury of Malheur County, Oregon, which motion was by the court overruled, and the amended indictment was filed by the district attorney. The ground of the objection to the original indictment was that it charged the burning of a stable, namely, the Jordan Valley Livery-stable, and did not name the owner of the stable. The amended indictment sets forth that he burned a stable, to wit, the Jordan Valley Livery-stable, being then and there the property of another, to wit, the Jordan Valley Hotel Company, a corporation. Defendant was tried upon the said indictment and found guilty, from which sentence he appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Julian Hurley* and *Mr. George W. Hayes*, with an oral argument by *Mr. Hurley*.

For the State there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. William H. Brooke*, District Attorney, and *Mr. Ralph W. Swagler*, with oral arguments by *Mr. Brown* and *Mr. Swagler*.

MR. JUSTICE EAKIN delivered the opinion of the court.

1, 2. Section 1932, L. O. L., provides:

"If any person shall willfully and maliciously burn in the night-time any church, courthouse, * * or any * * mill, barn, stable, shop, or office of another, * * such person shall be deemed guilty of arson."

Therefore, it was necessary to allege the owner of the barn as a part of the description of the offense. Its omission from the charge was fatal to a demurrer, and the amendment of the indictment is authorized only by the Constitution itself in this state, which provides that it may be amended as to matter of form merely. We have no statute authorizing such amendments, or any legislation upon the subject, other than the amendment by the clause in the Constitution. By our Constitution the defendant is entitled to be tried upon an indictment found by a grand jury who act under oath, and amendment of the indictment in matters of substance is unauthorized. The authorities seem to all agree that such an amendment is unauthorized, unless approved by the grand jury, or that such an amendment is authorized by statute. In *Welty v. Ward*, 164 Ind. 457 (73 N. E. 889, 3 Ann. Cas. 556), the court, after citing cases from the State

of Massachusetts and the ruling of the Supreme Court of the United States, states that the rulings in those cases are not recognized in Indiana, because in those instances there was no statute authorizing the amendment of the indictment. However, the court says:

"In this state [Indiana] we have a statute which authorized the court to order the correction of the indictment, and a Constitution which provides (Section 17, Article VII) that the General Assembly may modify or abolish the grand jury system. Statutes authorizing the amendment of indictments have been sustained in a number of states."

Our Constitution contains the only provision which authorizes such an amendment, but only as to form; and there seems to be a well-recognized distinction between matters that are purely matters of form and matters that go to the substance of the indictment, namely, formal matters which are not essential to the charge and merely clerical errors, such as where the defendant cannot be misled to his prejudice by the amendment, would be the only cases which are permissible under our Constitution. But where there is an omission or misstatement which prevents the indictment from showing on its face that an offense has been committed, or to charge the particular offense, the test of the amendment is whether the same defense is available to the defendant after the amendment as before and upon the same evidence. Many of the authorities state that an indictment cannot be amended except where specially authorized. In this case it must have been specially authorized by the Constitution itself, and can go only to matters of form. The *Encyclopedia of Pleading and Practice*, Volume 1, at page 688, provides:

"An indictment cannot, except in cases where the law has specially authorized such proceeding, and in matters of form which are not matters of substance, be amended by the court without the concurrence of the grand jury, even with the consent of the accused."

On page 690 we find:

"Matter that is essential to be set forth or to show that an offense has been committed is matter of substance, and cannot be amended without the concurrence of the grand jury."

In 22 Cyc., at page 445, it is stated:

"Material allegations of the indictment must be proved. Matter which is not charged in the indictment need not be proved or considered. * * As a general rule, matter alleged in identification of property must be proved as alleged. * * If the indictment state the name of the owner of property, although unnecessarily, it must be proved as laid."

Matters that are necessary to be proved as alleged are material to the indictment. At page 439 it is said:

"In applying the principles set forth and statutes referred to in the preceding subdivisions with reference to matters of substance and form, there has been some conflict of opinion as to what are to be regarded as amendments in matter of substance as distinguished from mere matter of form. It is, perhaps, safe to say, however, on the one hand, that the power of amendment extends to formal matters which are not essential to the charge, and mere clerical errors, etc., where the defendant cannot be misled or prejudiced; but, on the other hand, any omission or misstatement which prevents an indictment or information from showing on its face that an offense has been committed, or from showing what offense is intended to charge, is a defect in matter of substance which cannot be cured by amendment at the trial, or in the case of an indict-

ment, by the court at any time, where an indictment is necessary."

Bishop on Criminal Procedure, Section 97, provides:

"Mere formal allegations may be amended where a statute so authorizes; those of substance, not."

There seems to be a distinction made in all of the text-books as to the amendment of matters in an indictment and matters in an information. In the former case the Constitution requires that the defendant be charged by an indictment, and these rules as to amendment do not apply thereto; but an information is not considered a charge found by a grand jury under oath. Therefore, the legislature may provide for the amendment of an information even in matters of substance. It is said in *State v. Springer*, 43 Ark. 91:

"An indictment when filed in court is a record and cannot be withdrawn for amendment or any other purpose. If insufficient, a *nolle prosequi* should be entered and a new indictment found."

In *State v. John Lyon*, 47 N. H. 416, it is held:

"The name of the owner of the goods, in an indictment for larceny, is a matter of substance, and cannot be supplied by amendment."

In *State v. Startup*, 39 N. J. Law, 424, it is stated:

"If an indictment found by a grand jury fail to set out any crime, the court cannot amend it as to charge the crime which it is supposed they intended."

See *State v. Twining*, 71 N. J. Law, 388 (58 Atl. 1098).

The judgment is reversed and the cause remanded for further proceedings. REVERSED AND REMANDED.

Argued May 5, reversed June 1, 1915.

TOWN OF HAINES v. EASTERN OREGON L. & P. CO.

(149 Pac. 87.)

Constitutional Law—Obligation of Contracts—Franchises.

1. Where a franchise is given to an electric company by an ordinance and is accepted by the company and acted on by it and its successor, an executed contract is constituted which cannot be altered without the consent of both parties.

Franchises—Construction—Ordinances.

2. The provisions of a franchise when treated as a contract are not to be construed as the clauses of a municipal charter, but, like any other agreement, such interpretation is to be adopted as will determine the intention of the parties from the language they have employed, and, when two interpretations are permissible, that construction which is most favorable to the public should be adopted.

Electricity—Franchise—Construction—Meters.

3. Under an ordinance granting a franchise to an electric light company, and providing in one clause that a flat rate should be charged during the life of the franchise, and providing in another clause a maximum rate in case meters were installed, the company has a right to install meters at any time, where it does not charge therefor more than the rate fixed.

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by the Town of Haines, a municipal corporation, against the Eastern Oregon Light & Power Company, a corporation, to enjoin the use of electric meters. The cause being at issue was tried upon an agreed statement of facts, in substance as follows: That, exercising the power conferred upon the plaintiff, the Town of Haines, by its charter, the mayor and council, on November 1, 1906, enacted an ordinance granting to the Baker Light & Power Company, its successors and assigns, the right for a term of 30 years, to locate, erect and maintain in the streets, alleys and public places of that municipality poles

with cross-arms and to suspend thereon wires to be employed in transmitting electricity to be used by the plaintiff and its citizens for illumination. Section 10 of the enactment, as far as considered material, reads:

"It is hereby provided that the said Baker Light & Power Company, its successors and assigns, shall, during the life of this franchise, make a flat rate for electric lights to the City of Haines, and to the inhabitants thereof, and that the rates charged therefor shall not exceed the following tabulated rates."

Here are set forth the respective charges, not exceeding certain sums per month, for the use of incandescent lights of 4, 8, 16 and 32, candle-power, and of arc-lights of specified amperes, from dark until midnight, and also for all-night service. The section referred to contains a clause as follows:

"In case of installation of meters, the meter rate shall not exceed twenty cents per thousand watt hours."

That the franchise was accepted by the grantee, which put up poles, strung wires, erected structures, and maintained and operated in that town a lighting system, supplying electricity at the flat rates prescribed until shortly prior to the commencement of this suit, when, in consequence of the use of electric lights by certain citizens of the Town of Haines for a longer period and of a greater intensity than they were entitled to, the defendant, as the successor of the Baker Light & Power Company, found it necessary to install meters and to charge a maximum rate of 15 cents per thousand watt hours, and to exact from users of a greater quantity of electricity a commercial rate of from 4 cents to 10 cents per K. W. hour, and that in no instance has a rate been charged which amounted

to the meter rate prescribed by the ordinance. That, for the reason stated, the defendant discontinued giving a flat rate, insisted upon meter rates, demanded payment for supplying electricity according to the latter measurement, and in some instances when meters were refused by users their lights were shut off until meters were installed, when under protest they were set up. And that the plaintiff and its inhabitants have no other available source for lighting the streets and houses of the town than by the electricity supplied by the defendant. Findings of fact having been made in conformity with the stipulation, a decree was rendered as prayed for in the complaint, and the defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief over the names of *Mr. John L. Rand* and *Mr. A. A. Smith*, with an oral argument by *Mr. Rand*.

For respondent there was a brief and an oral argument by *Mr. Frank B. Mitchell*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. It is contended that, construing together the parts of the municipal enactment referred to, the defendant, as the successor in interest of the grantee of the franchise, had the right to install and use electric meters, subject, however, to the limitation that the rate to be charged for electric energy should not exceed the sum prescribed by the enactment, and that in denying an exercise of the privilege granted an error was committed. The provisions of the ordinance having been accepted and acted upon by the grantee of the franchise and its successor, the enactment became an exe-

cuted contract which cannot be altered without the consent of both parties: 8 Cyc. 950; McQuillin, Mun. Corp., § 1165; *Detroit v. Detroit St. Ry. Co.*, 184 U. S. 368 (46 L. Ed. 592, 22 Sup. Ct. Rep. 410).

2. The provisions of an ordinance, when treated as a contract, are not to be construed as the clauses of a municipal charter, but, like any other agreement, such an interpretation is to be adopted as will determine the intention of the parties from the language they have employed: McQuillin, Mun. Corp., § 811; McQuillin Mun. Ord., § 290; *Savage-Scofield Co. v. City of Tacoma*, 56 Wash. 457 (105 Pac. 1032). When two interpretations of a municipal ordinance, treated as a contract, are permissible, that construction which is most favorable to the public should be adopted: McQuillin, Mun. Ord., § 290. The cases cited to support the text, which appears under the topic, "when the ordinance is to be treated as a contract," are *Freeport Water Co. v. Freeport*, 180 U. S. 587 (45 L. Ed. 679, 21 Sup. Ct. Rep. 493), *Danville Water Co. v. Danville*, 180 U. S. 619 (45 L. Ed. 696, 21 Sup. Ct. Rep. 505), and *Rogers Park Water Co. v. Fergus*, 180 U. S. 624 (45 L. Ed. 702, 21 Sup. Ct. Rep. 490). In each of these cases a statute of Illinois authorizing municipal corporations to supply water for public use was construed. In the first case, the ruling in which was followed in the others, it was held that the power granted by the statute could, without exertion, be construed as distributive; that a city council was authorized to contract for the construction and maintenance of waterworks, at such rates as might be fixed by ordinance and for a period not exceeding 30 years; that the words "fixed by ordinance" might be construed to mean by ordinance once for all to endure during the whole period of 30 years, or by ordinance

from time to time as might be deemed necessary; and that, of the two constructions, that should be adopted which was most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time. It will thus be seen that, while the provisions of ordinances were considered in the cases referred to, it was in fact the language of a statute, granting power, equivalent to clauses of a municipal charter enacted for the same purpose, that was interpreted.

3. The rule governing cases of this kind should be that where a municipal ordinance, which is treated as a contract, is fairly susceptible to two constructions, that interpretation should be adopted which is most favorable to the public. An examination of the language of Section 10 of the ordinance in question, in order to determine the intention of the contracting parties, would seem to induce the construction that the clauses hereinbefore quoted, when read together, were not subject to two constructions. In the first part of the section, though a flat rate for the use of electric lights for 30 years is provided for, it is thereafter stipulated that, if meters be installed, the rate for the electric energy thus consumed shall not exceed a specified sum per thousand watt hours. Had the contract, evidenced by the ordinance, been assented to by private parties, no doubt would be entertained that the grantee of the right was given the privilege to change, at pleasure, the method of determining the compensation to be paid for the electricity used, subject, however, to the limitation that the meter rate should not exceed the sum per month specified. The privilege of adopting a meter rate was evidently not inserted in the ordinance to enable the parties sub-

sequently to conclude an agreement to that effect. Such a clause was wholly unnecessary for that purpose, since every contract, except possibly that of marriage, can be altered or annulled by mutual consent of the parties.

It is believed that no doubt can reasonably exist, when the entire ordinance is considered, that a privilege was conferred by the municipal enactment upon the grantee of the franchise, its successors or assigns, to change at pleasure the rate from a flat to a meter basis, and that an error was committed in granting the relief awarded.

Issues were made by the pleadings respecting charges for rent of meters and exactions of a sum of money for installing them, which latter payment was to be returned when the use of the electricity was discontinued. The facts as stipulated do not refer to these disputed questions, and for that reason the averments of the complaint in these particulars will be treated as unsubstantiated.

For the error referred to, the decree should be reversed and the suit dismissed, and it is so ordered.

REVERSED AND DISMISSED.

MR. JUSTICE BENSON took no part in the consideration of this cause.

Argued May 7, reversed and suit dismissed June 1, 1915.

GRANT COUNTY BANK v. HAYES.

(149 Pac. 473.)

Fraudulent Conveyances—Rights of Creditor—Knowledge of Fraud.

1. The mere fact that a judgment creditor had knowledge of the fraud in a conveyance by the judgment debtor would not prevent him from setting aside a conveyance made with that intent, but is valuable only on the question of acquiescence.

Fraudulent Conveyances—Preference to Creditor.

2. Under Sections 7397-7401, L. O. L., relating to fraudulent conveyances, a debtor has the right to prefer one creditor over another.

Fraudulent Conveyances—Consideration—Valuable.

3. Under Section 7401, L. O. L., protecting a purchaser for valuable consideration in case of fraudulent conveyances, if the purchaser has notice of the fraud, it is immaterial what consideration is paid, and if the purchaser has no notice, it is not necessary that the consideration be adequate if it is valuable.

Fraudulent Conveyances—Rights of Creditor—Knowledge of Transaction—Estoppel.

4. In an action by the assignee of a judgment creditor to set aside as fraudulent a conveyance from the debtor to his wife, evidence held to show that the judgment creditor, who was an uncle of the debtor, acquiesced in the sale, thereby defeating the assignee's right of action.

From Grant: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit instituted on February 4, 1914, in which the Grant County Bank, a corporation, a judgment creditor of one H. B. Hayes, would set aside as fraudulent and void a deed made by the judgment debtor to his then wife, Della Hayes, September 14, 1908, and subject the land therein described to the payment of the plaintiff's judgment obtained May 19, 1913. The complaint charges in substance that the conveyance was executed by Hayes without consideration and with intent to injure, delay and defraud his creditors, and particularly his uncle, E. Stewart, to whom he was then indebted, and that the wife accepted the conveyance with knowledge of the fraud and participated in the deceit charged, intending to hold the land in secret trust for her husband. The answer of Della Hayes, who alone defended, denies the imputation of fraud, and in substance declares that at the time of her marriage in 1900 she was possessed in her own right of three milch cows with their calves, and four head of horses; that these cattle with their increase were disposed of by her husband in his own

interest, with the result that about September 14, 1908, the date of the conveyance to her, he was indebted to her in about the sum of \$1,500, the reasonable value of the cattle and increase resulting from their management for the eight years of the then married life of the parties to the deed, in consideration of which he conveyed the real estate in question to her and she discharged him from all liability on account of the property belonging to her of which he had disposed. This in turn is challenged by the reply. Although there was no pleading about her having a mere lien upon the premises for the value of the property appropriated by her husband, the Circuit Court made a decree impressing upon the realty a paramount lien in favor of the answering defendant for \$375, with interest at 6 per cent per annum from September 14, 1908, set aside the conveyance, and directed a sale of the property and the application of the proceeds of such sale to the payment of the lien mentioned; the surplus, if any, to be applied to the judgment for the satisfaction of which the plaintiff would sequester the property. Della Hayes appeals. REVERSED. SUIT DISMISSED.

For appellant there was a brief and an oral argument by *Mr. A. D. Leedy*.

For respondent there was a brief and an oral argument by *Mr. J. E. Marks*.

MR. JUSTICE BURNETT delivered the opinion of the court.

It appears from the evidence that E. Stewart was the uncle of H. B. Hayes, the husband of Della Hayes, they having been married in 1900. E. Stewart is also a director of the plaintiff bank. Hayes had a home-

stead upon which patent was issued April 2, 1908. Stewart had advanced to his nephew \$1,150, with which to purchase the additional property in question for which the nephew gave his note to Stewart October 20, 1905. It was without dispute that in 1900 the wife was the owner of three milch cows and their calves, besides four horses. Her husband managed the cattle, being engaged to some extent in stock-raising, and from time to time disposed of the increase without making account thereof to the wife. It is beyond controversy that as between the husband and wife she had a claim against him at the time of the conveyance for the cattle belonging to her of which he had disposed. The contention on that point is about the reasonable value of the personal property mentioned. Neither party gives any accurate figures on the number of cattle. In that feature the evidence is all estimate. As above stated, the Circuit Court found the reasonable value of that livestock to be \$375. The uncle, E. Stewart, seems to have advanced other amounts of money to his nephew, the husband, after the execution of the deed. The wife testifies that at the time that instrument was made the uncle was solicitous for a payment on the nephew's indebtedness; that her husband proposed to her to turn over her cattle as a payment on the amount owing to the uncle; that she demurred to this and was unwilling to give up her property in payment of her husband's debts, but that finally she agreed to do so on condition that he convey to her the land in question. She further deposes that she had no knowledge of any indebtedness of her husband except that to the uncle besides her own claim; that with her husband she consulted the uncle on the subject, and that he agreed the transaction should take place in that manner, the cattle to

be turned over to the uncle to be applied on the indebtedness of the nephew, who in turn should convey the land to his wife. As stated, the conveyance was made September 14, 1908, and recorded in the deed records of the county December 23, 1908. The husband, although contradicted by his wife, in this particular, testifies that he was then about to engage in the mercantile business in Dayville, and not being skilled in that vocation he agreed with his wife that they would put the property in her name, so that, should business prove disastrous, or should the uncle die, his health being then infirm, they could gain time to pay off the indebtedness without being deprived of their home. He says in his testimony substantially that he was fearful he could not deal with his uncle's administrator or executor on as favorable terms as with the uncle himself, who, it seems, was very indulgent as a creditor.

The husband had other property, and afterward became largely indebted directly to the plaintiff bank, and in March, 1913, it instituted an action against him for the moneys directly due it from him. On the following day it brought another action against the husband on the indebtedness then due to the uncle, E. Stewart, the latter having assigned the notes to the bank for collection. Judgments were recovered in both actions and the other property of the husband was bid in on execution sale for the full amount of the bank's separate judgment, and this suit was instituted to subject the property included in the deed to the wife to the satisfaction of the judgment which the bank recovered as assignee of the uncle. The husband and wife separated in December, 1912, and she procured a divorce from him, since which time he has remarried. The uncle testifies that he knew nothing

of the transfer of title until after it was made. He says, however, that he learned of it late in the year 1908. Another nephew testifies that at the time of the transaction the uncle told him that the transfer was about to be made. It appears, also, by the testimony of the latter nephew that he was engaged in handling some of the cattle of E. Stewart on shares at that time, and that some of those belonging to the wife were transferred into the band of which he had charge.

1. It is true that the mere fact that the creditor had knowledge of the fraud would not prevent him from setting aside a conveyance made with that intent. The only value to be given to the knowledge imputed to the then creditor is on the question of his acquiescence in the arrangement, and further illustrating the good faith of the parties to the deed as tending to show that the transaction was not done in a corner or secretly.

2, 3. The substance of the situation is that at the time the deed was made the husband was in debt to his uncle and also to his wife. He had a right, so far as that was concerned, to pay her, the wife, to the exclusion of his other creditor, the uncle. The precept of Section 7397, L. O. L., is in substance that every conveyance or assignment in writing or otherwise of any estate or interest in lands made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void. Section 7400, L. O. L., states that:

"The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law."

Section 7401, L. O. L., reads thus:

"The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Under the provisions of this section it would matter not how full or adequate the consideration might be which the grantee paid for the conveyance if she had previous notice of the fraudulent intent of her grantor. On the other hand, the statute does not give any heed to the mere adequacy of consideration. If without notice of her grantor's fraudulent purpose she acquired the land for a valuable consideration, her title is protected by the terms of Section 7401, L. O. L. It is apprehended that gross insufficiency of price might be considered as a circumstance tending to prove fraud in case there was any element of deceit or concealment. So far as that is concerned a person having a right to sell property may at his option sell it for much less than its actual value, and that alone would not be sufficient to nullify the conveyance in favor of some other claimant.

4. The weight of the testimony in our estimation shows that the uncle was cognizant of the making of the deed. The wife says that she and her husband consulted with the creditor at that time and he approved it. The other nephew testifies that his uncle told him of the transaction at the time it was about to be accomplished. The deed was placed on record and the transaction stood for some five years before

it was attacked, and then the creditor did not attack it himself, but delegated the matter to the bank of which he was a director. The plaintiff here stands in no better plight than its assignor, the original creditor. It is worthy of remark that this proceeding followed closely upon the dissolution of the marriage between the debtor nephew and his wife, at her suit.

The disposition of the cattle was a matter between the husband and wife resulting in a just claim on her part against him which he had a right to prefer even against his uncle. It appears that some at least of the plaintiff's cattle went into the possession of the uncle, but whether they did or not cannot affect the indebtedness of the husband to the wife, if in fact, as it appears without dispute, he used the property for his own purposes.

In brief, the husband was indebted to his wife. He conveyed to her the property. The transaction was without concealment, and being brought home to the knowledge of the uncle he, by his long inaction, must be held to have acquiesced in the same. No fraud can be imputed to a transaction where the one attacking it has practically assented to it and adopted it. The element of acquiescence distinguishes it strongly from a case where one is defrauded before his eyes, however unwillingly. It is apprehended that if the domestic relations of the nephew and his wife had continued harmonious we would have heard nothing of this proceeding. Having a right to prefer his wife creditor, the husband did so openly, and the uncle creditor having acquiesced in it for so long with knowledge of the situation, cannot now justly claim that the preference in her favor should be ignored and her property taken to pay his debt.

The decree is reversed, and the suit dismissed; neither party to recover costs or disbursements from the other.

REVERSED. SUIT DISMISSED.

Submitted on briefs, May 18, reversed and remanded June 1, 1915.

BEAMISH v. NOON.

(149 Pac. 522.)

Names—Assumed Names—Statutes—Right to Sue.

1. Under Laws of 1913, page 270, depriving a person doing business under an assumed name failing to file the certificate required of the right to sue, which act gave 30 days after it took effect for merchants to comply with the act, goods sold at any time up to the end of the 30-day period could be recovered for, though no certificate was filed.

Justices of the Peace—Jurisdiction—Capacity of Party to Sue—Assumed Name—Special Demurrer.

2. A justice court is not deprived of jurisdiction of a suit by a person doing business under an assumed name because the certificate required by Laws of 1913, page 272, Section 5, is not filed with the county clerk, unless the defect is raised by a special demurrer in the nature of a plea in abatement, since the act affects the qualification of the party to sue and not the statement of the cause of action.

Parties—Capacity to Sue—Assumed Names—Waiver.

3. Where a plaintiff sues under an assumed name without alleging the filing of the certificate as required by Laws of 1913, page 272, Section 5, the incompetency of plaintiff to sue is manifest on the face of the complaint, and is waived by answering to the merits (Section 72, L. O. L.).

From Benton: JAMES W. HAMILTON, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an appeal by W. Beamish from a judgment of the Circuit Court of the State of Oregon for Benton County dismissing a writ of review. The facts are that an action was commenced in a Justice's Court for that county, the complaint, omitting the title of the court, the prayer for judgment, the name of plain-

tiff's attorney, the verification and the filing, being as follows:

"W. Beamish, doing business as Cash Market, plaintiff, v. W. A. Noon, defendant. Plaintiff for cause of action against the defendant above-named complains and alleges the following facts: That the plaintiff at all of the dates and times hereinafter set forth, was and now is engaged at Corvallis, Oregon, in the general meat and butcher business. That as such he conducts his said business as Cash Market. That between the first day of June, 1913, and the second day of September, 1913, the said Cash Market sold and delivered to defendant at his special instance and request, goods, wares and merchandise consisting of meat, beef, pork and market supplies. That the reasonable value of the said goods was the sum of \$89.43. That the defendant has failed, neglected and refused to pay plaintiff for the said goods so sold and delivered except the sum of \$10 paid thereon on the 26th day of August, 1913."

An answer was filed denying the material averments of the complaint and alleging in effect that the sales so charged were made to the W. C. Noon Lumber Company, a corporation, of which the defendant was and is the manager. A reply having put in issue the allegations of new matter in the answer, the cause was, by agreement of the parties, set for trial December 1, 1913.

Ten days prior thereto, however, the defendant served upon the plaintiff and offered for filing a demurrer, based on the following grounds:

"First, that the said court has not jurisdiction of the subject matter mentioned in the complaint; second, that the said complaint does not state facts sufficient to constitute a cause of action."

Thereupon the justice notified counsel for the respective parties to appear before him and upon their

compliance therewith the demurrer, over objection of plaintiff's counsel, was filed. The issue of law thus raised was tried December 8, 1913, and taken under advisement, but two days thereafter the demurrer was sustained on both grounds and the action dismissed. In order to review such decision a writ was issued and for a return thereto the proceedings, papers, etc., pertaining to the cause, were duly certified up to the Circuit Court for that county, resulting in the judgment and appeal as hereinbefore mentioned.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND REMANDED.

For appellant there was a brief by *Mr. O. Middlekauff*.

For respondent there was a brief submitted by *Messrs. McFadden & Clarke*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. Chapter 154, General Laws of Oregon of 1913, was filed in the office of the Secretary of State February 25th of that year. The legislative assembly, which enacted the law, adjourned on the fourth day of the succeeding March, and as the measure had no emergency clause, it did not take effect until the third day of the following June: Const. Or., Art. IV, § 28. The statute referred to, as far as its provisions are deemed involved, reads:

“No person or persons shall hereafter carry on, conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the real and true name or names of the person or persons conduct-

ing such business or having an interest therein, unless such person or all of such persons conducting said business or having an interest therein, shall file a certificate in the office of the county clerk of the county or counties in which said business is to be conducted, which certificate shall set forth the designation, name or style under which said business is to be conducted, and the true and real name or names of the party or parties conducting or intending to conduct the same, or having an interest therein, together with the post-office address or addresses of said person or persons * * ”: Section 1.

“Any person or persons now conducting any business under such assumed name * * shall file and cause to be recorded and indexed in a book to be kept for that purpose, a certificate, as provided for in Section 1 of this act, within 30 days after this act shall take effect * * ”: Section 2.

“No person or persons carrying on, conducting or transacting business as aforesaid, or having any interest therein, shall hereafter be entitled to maintain any suit or action in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided * * in Section 1, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit”: Section 5.

“Any person violating any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding \$100”: Section 6.

The language thus quoted is almost identical with the wording of a statute of Michigan: Pub. Acts Mich. 1907, No. 101. In referring to the latter enactment in *Cashin v. Pliter*, 168 Mich. 386 (134 N. W. 482, Ann. Cas. 1913C, 697, 699), Mr. Justice STEERE observes:

“The one object of the act is manifestly to protect the public against imposition and fraud, prohibiting persons from concealing their identity by doing business under an assumed name, making it unlawful to use

other than their real names in transacting business without a public record of who they are, available for use in courts, and to punish those who violate the prohibition. The object of this act is not limited to facilitating the collection of debts, or the protection of those giving credit to persons doing business under an assumed name. It is not unilateral in its application. It applies to debtor and creditor, contractor and contractee, alike. Parties doing business with those acting under an assumed name, whether they buy or sell, have a right, under the law, to know who they are, and who to hold responsible, in case the question of damages for failure to perform or breach of warranty should arise."

Oklahoma has a similar statute, and in a note to the case of *Patterson v. Byers*, 10 Ann. Cas. 810, 812, reference is made to the enactments of other states relating to the same subject.

2. An examination of our statute will show that after its enactment no person was permitted to carry on, conduct or transact business under an assumed name, unless he filed the necessary certificate, to comply with which requirement he was allowed 30 days after the act took effect. The complaint in the case at bar discloses that between June 1, 1913, and September 2d of that year, the goods, wares and merchandise referred to are alleged to have been sold and delivered to the defendant. By the express provisions of the enactment, the plaintiff, who is averred to have been engaged in business as the Cash Market when the statute went into effect, was given until July 3, 1913, in which to comply with the terms of the law. All sales of meat so made within that limited time were valid, without filing the required certificate, and hence an action could have been maintained against a purchaser of such food to recover the reasonable

value thereof without alleging or proving that the certificate had been filed. A part of the cause of action as set forth in the initiatory pleading could unquestionably have been maintained under any circumstance, notwithstanding the enactment of the statute.

Section 5 of the act under consideration does not relate to the statement of facts constituting a cause of action, but to the necessary qualifications of a party, doing business under an assumed name, to maintain an action. The complaint herein averred a sale and delivery to the defendant at his request of goods, wares and merchandise, alleged the reasonable value thereof, and that such sum had not been fully paid, thus demonstrating that the primary pleading stated facts sufficient to constitute a cause of action. The Constitution and law of Oregon give a Justice's Court jurisdiction of civil actions of this kind where the sum involved does not exceed the amount undertaken to be recovered herein. Neither ground set forth in the demurrer was tenable, and an error was committed in sustaining it: *Waggy v. Scott*, 29 Or. 386, 388 (45 Pac. 774).

3. The only defect available, which appeared on the face of the complaint, was a failure to disclose the plaintiff's qualifications to maintain a part of the cause of action by averring that the required certificate had been filed. This deficiency could have been called to the attention of the court by a demurrer, special in its nature, and tantamount to a plea in abatement, which, if it had been interposed within the time allowed for that purpose, would have been availing: *Marx & Jorgenson v. Croisan*, 17 Or. 393 (21 Pac. 310). The incompetency of the plaintiff to maintain the action, being thus manifest on the face of the complaint, was waived by answering to the merits: Section 72,

L. O. L.; *Wilson v. Wilson*, 26 Or. 251, 261 (38 Pac. 185); *OWings v. Turner*, 48 Or. 462 (87 Pac. 160); *Portland v. Coffey*, 67 Or. 507 (135 Pac. 358); *Turnbull v. Michigan etc. R. Co.* (Mich.), 150 N. W. 132. An error was committed by the Circuit Court in dismissing the writ.

It follows from these considerations that the judgment is reversed, the demurrer overruled, and the cause sent back to the Circuit Court, with directions to remand it to the Justice's Court where it originated, there to be tried upon the issues made by the complaint, answer and reply.

REVERSED AND REMANDED.

Submitted on briefs May 24, affirmed June 1, 1915.

WATKINS v. RECORD PHOTOGRAPHING
ABSTRACT CO.

(149 Pac. 478.)

Action—Forms of Action—Statutory Provisions.

1. Though under Section 1, L. O. L., providing that the distinction theretofore existing between forms of actions at law is abolished, and that there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs, forms of action have been abrogated, the substance of the common-law actions remains.

Corporations—Specific Performance—Stock Subscription—Failure to Deliver Stock—Remedies.

2. A party who has advanced money on account of the purchase of corporate stock which is not delivered to him may sue for specific performance or for his damages occasioned by the breach, or he may rescind the contract and sue in *assumpsit* for the recovery of the sum paid as money had and received.

[As to specific performance of contracts for sale of corporate stock, see note in 135 Am. St. Rep. 689.]

FROM COOS: JOHN S. COKE, Judge.

Statement by MR. CHIEF JUSTICE MOORE.

This is an action by George Watkins against the Record Photographing Abstract Company, a corporation, to recover money. The complaint states, in effect, that the defendant is a corporation and the plaintiff a duly licensed attorney of Oregon; that during the year 1912, and prior to June 1st thereof, the plaintiff, at the request of the defendant, performed for it professional services of the reasonable value of \$100; that in the years 1912 and 1913, at the further request of the defendant, the plaintiff paid out for its exclusive use and benefit sums of money, giving the respective dates and items thereof, amounting to \$646.55; "that defendant received and accepted the same and the benefit arising therefrom, and promised and agreed to pay plaintiff therefor in its capital stock at par when his demands should be presented and audited, and plaintiff agreed to accept the same; that during the month of April, 1913, plaintiff prepared and delivered to defendant an itemized statement of his claims and demands against it substantially as above set forth, * * and demanded that defendant audit and allow the same and issue plaintiff stock therefor as agreed; that defendant then and there wrongfully refused and neglected to audit or allow plaintiff's claims and demands or to issue or deliver to plaintiff any stock or to do anything at all in the matter in violation of its promises and agreements"; that the defendant wrongfully refuses to carry out such engagement to plaintiff's loss in the sum of \$746.55, for which judgment is demanded.

The answer admits each allegation of the complaint in respect to the reasonable value of the services so performed and of the several sums of money so paid, but denies the remaining averments. For a further

defense it is alleged, in substance, that during the year 1912 the defendant was duly organized by the plaintiff, together with W. J. Rust and Edward A. Harris, who severally subscribed for \$1,700 of the stock of the corporation, and each was elected a director and officer thereof; that by resolution of the directors it was determined that the value of any services performed and the equivalent of any money paid by either of them at the request of the defendant should be credited on account of his subscription; that at all times the defendant has been ready and willing to issue to the plaintiff, in satisfaction of his demands, its capital stock in shares of \$100 each, the par value thereof, and "now tenders" the same to him in payment of his claim; that the defendant has heretofore been unable to make such tender, because the plaintiff, as an officer of the corporation, refused to surrender to it the books, stock certificates, etc., of which he had the exclusive possession.

The reply denies the allegations of new matter in the answer, except it admits that on April 22, 1912, each person named subscribed for capital stock of the corporation in the sum stated, whereupon directors were elected as follows: Rust for three years; Harris for two; and the plaintiff for one. It alleges that on August 2, 1912, by resolution of the board of directors, the plaintiff's subscription, with his consent, was reduced to ten shares; that the stock-book was left in the possession of the plaintiff, who has cared for it without any demand having been made for its delivery; and that since April 22, 1913, he has not been a director of the corporation.

Based on these issues the cause was tried, resulting in a judgment as prayed for in the complaint, and the defendant appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). **AFFIRMED.**

For appellant there was a brief over the names of *Messrs. Peck & Peck* and *Mr. J. M. Upton*.

For respondent there was a brief submitted by *Mr. Charles I. Reigard* and *Mr. George Watkins*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is maintained by the appellant that the pleadings disclose a cause of action founded upon an express contract whereby the defendant was to deliver its capital stock at par to the plaintiff in settlement of his demand; that the wrong complained of is the non-observance of the terms of that agreement, thereby limiting the recovery to the market value of such stock at the time of the breach, and, such being the case, an error was committed in construing the complaint as stating a cause of action in *assumpsit*. This postulate is denied by respondent's counsel, who asserts that, where a party to an agreement refuses to comply with its terms, the other party thereto, if not himself in fault, may elect to treat the contract as rescinded, and recover what he has paid thereon, in the nature of an action in *assumpsit* on an implied contract as for money had and received.

1. Our statute relating to the forms of action reads:

"The distinction heretofore existing between forms of actions at law is abolished, and hereafter there shall be but one form of action at law, for the enforcement of private rights or the redress of private wrongs": Section 1, L. O. L.

Though the forms have thus been abrogated, the substance of the common-law actions remains: *Weber*

v. *Rothchild*, 15 Or. 385 (15 Pac. 650, 3 Am. St. Rep. 162); *Hornefus v. Wilkinson*, 51 Or. 45 (93 Pac. 474); *Lee Tung v. Burkhart*, 59 Or. 194 (116 Pac. 1066); *Van de Wiele v. Garbade*, 60 Or. 585 (120 Pac. 752).

2. In discussing the subject of subscriptions for capital stock, a text-writer remarks:

"The corporation is bound, upon demand, to deliver to a stockholder a certificate of stock representing his interests in the corporation. If it refuses to issue the certificate, the stockholder may bring suit in equity to compel its issuance, or he may recover of the corporation in *assumpsit* the value of the stock at the time of the demand": 1 Cooke, Corp. (7 ed.), § 61.

In *Swazey v. Choate Mfg. Co.*, 48 N. H. 200, the plaintiff, having advanced to a corporation money for shares of stock which were not issued to him, rescinded the agreement and brought an action in *assumpsit* for money had and received, and it was held that a recovery could be had. Mr. Justice BELLOW, speaking for the court in deciding the case, observes:

"By the terms of the receipt the defendants were to issue to the plaintiff the stock of the corporation to the amount of the \$300 paid by him, which, as the case finds, was three shares; and it may fairly be inferred that defendants were to deliver to the plaintiff the proper evidence of the issuing of that stock, that is, the usual certificates. On the refusal of the defendants to issue the stock the plaintiff might maintain a suit on the contract and recover damages for the breach of it, or he might rescind the contract and recover back the money so paid."

So, too, in *Kinser v. Cowie*, 235 Ill. 383 (85 N. E. 623, 126 Am. St. Rep. 221), it was ruled that a purchaser of shares of stock in a corporation might rescind the contract and recover the purchase money from the vendor when the latter refused to deliver the stock

certificate as agreed: See, also, *Morgan v. Hendrie*, 34 Colo. 25 (81 Pac. 700, 7 Ann. Cas. 935).

Mr. Thompson, in his work on the Law of Sales of Stocks and Bonds, 123, 124, in treating of actions in *assumpsit*, says:

"A buyer's measure of damages against the seller for failure to perform a condition precedent to the sale, on paying the purchase money, is usually the amount of his purchase money."

The rule to be deduced from these authorities is that a party who has advanced money on account of the purchase of corporate stock which is not delivered to him has a choice of the following remedies: (1) He may, in some jurisdictions, maintain a suit in equity for specific performance, and compel a delivery of the stock; (2) he may treat the executory agreement as subsisting and recover the damages occasioned by the breach; or (3) he may rescind the contract and maintain an action in *assumpsit* for the recovery of the sum paid as money had and received. The plaintiff herein has proceeded upon the theory of accepting as a rescission of the executory contract the defendant's failure to issue the certificates of stock, and has adopted the third remedy stated to recover the money and value of services he advanced in payment of his subscription.

Several disputed questions of fact were settled by the verdict, and require no consideration. Other assigned errors are deemed immaterial.

It follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Argued April 2, affirmed April 13, rehearing denied June 15, 1915.

**SOUTHERN OREGON COMPANY v. GAGE,
SHERIFF.**

(147 Pac. 1199; 149 Pac. 472.)

Taxation—Collection—Injunction.

1. Where a suit by the federal government to forfeit land for breach of the condition of the grant was pending, and the owner of the land was resisting the forfeiture and claiming to be the owner in fee, he is estopped to litigate the right of the county to tax the land as his property, and equity will not enjoin the collection of the taxes pending the outcome of the federal suit, even though the owner pays the amount of the taxes into court.

[As to invalid levy of assessment as ground for enjoining collection of tax, see note in Ann. Cas. 1915C, 755.]

From Coos: JOHN S. COKE, Judge.

In Banc. Statement PER CURIAM.

This is a suit for injunction by the Southern Oregon Company against W. W. Gage, as sheriff and tax collector of Coos County, to restrain defendant from selling certain land claimed by plaintiff. The case presented by the complaint is identical in every material respect with *Southern Oregon Co. v. Quine*, 70 Or. 63 (139 Pac. 332), except that in this case plaintiff brings the money into court and prays that it may be held to await the outcome of the litigation between the United States and itself. The Circuit Court sustained a general demurrer and dismissed the suit. Plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Hammond & Hollister*, with an oral argument by Mr. Austin S. Hammond.

For respondent there was a brief and an oral argument by Mr. Lawrence A. Liljeqvist.

Opinion PER CURIAM.

The deposit of the amount due for taxes does not, in our opinion, strengthen the plaintiff's case or differentiate it from *Southern Oregon Co. v. Quine*, 70 Or. 63 (139 Pac. 332); and the able brief and argument of counsel have failed to convince us that our holding in that case was incorrect. Upon the authority of that case the order of the Circuit Court is affirmed. **AFFIRMED. REHEARING DENIED.**

Denied June 15, 1915.

ON PETITION FOR REHEARING.

(149 Pac. 472.)

In Banc. MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. In a petition for rehearing counsel insist that the decision in *Southern Oregon Co. v. Quine*, 70 Or. 63 (139 Pac. 332), does not decide the question presented in this case. In our judgment, the plaintiff is by its own showing estopped from the privilege to litigate the right of the county to tax the property in question. The complaint shows that plaintiff holds the record title to the lands, is in possession of them, and claims to own them. This reveals such a condition of affairs as made it incumbent upon the assessor to list them for taxation as the property of plaintiff, and further indicates that until a forfeiture is judicially declared plaintiff is, in fact, the holder of the legal title to the land. No forfeiture has been declared by Congress or by any judicial tribunal, and until this is done plaintiff continues to be the owner: *Farrington v. Putnam*, 90

Me. 405 (37 Atl. 652, 38 L. R. A. 339); *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 45 Minn. 104 (47 N. W. 464); *The Kate Heron*, 6 Sawy. 106 (Fed. Cas. No. 7619). It being the duty of the assessor to assess the property, it naturally follows that it is the duty of the sheriff to collect the taxes, and he would violate the requirements of the statute if he failed to do so. Equity will not interfere to enjoin a public officer from doing an act which the law requires him to perform merely because it may result in a peculiar hardship in a particular instance. The hardship alleged in this instance is that the United States government is claiming that there has been a breach of a condition of the grant, and has instituted a suit to have the lands forfeited for such breach. Plaintiff does not allege that the state has no right to tax the land, but, on the contrary, shows facts which evince *prima facie* that the state should tax it. Its position practically is this:

“We hold the legal title to the land, are in possession of it, and claim to own it, but the government is attempting to have it declared forfeited, and if it succeeds we will not only lose the land, but the taxes we have paid upon it in addition. Therefore we ask the court to suspend the ordinary operations of law, and to act as a stakeholder between us and the county until the result of the suit brought by the government is settled.”

It seems clear that such action by us would be going beyond the law. The right of the county to tax this property is not in litigation in the suit brought by the government. It is true that, if the United States should succeed in having a forfeiture declared, one of the results would be that the land would be restored to the public domain, and would thereafter be nontaxable; but that would be a mere incident of the suit, and

not the object of it. The plaintiff cannot retain the legal title and refuse to pay taxes. It can avoid the taxes by conceding the claim of the government; otherwise it must show its faith in the soundness of its title by paying.

We adhere to our original opinion.

AFFIRMED. REHEARING DENIED.

Argued March 11, reversed March 30, motion to retax costs denied June 15, 1915.

DELOVAGE v. OLD OREGON CREAMERY CO.

(147 Pac. 392; 149 Pac. 317.)

New Trial—Grounds—Waiver of Law.

1. Under Section 548, L. O. L., providing that for the purpose of being reviewed an order setting aside a judgment and granting a new trial shall be deemed a judgment or decree, the Circuit Court can enter such order only when in the trial of the cause an error was committed so prejudicial that the judgment rendered would be reversed on appeal.

Negligence—Actions—Questions for Jury.

2. Negligence is a question of fact to be determined by the jury.

Municipal Corporations—Use of Streets—Actions for Injuries—Instructions.

3. In an action for injuries to a pedestrian on a city street, who was struck by a wagon, a requested instruction that there was no rule of law which makes it negligence for a person to stand in the street for a moment when he has taken proper precautions to look for approaching vehicles was misleading, as implying that the plaintiff would not, as a matter of law, be negligent under such circumstances, whereas it was for the jury to say whether or not such acts were negligent.

Trial—Instructions—Applicability to Issues—Negligence.

4. Where a complaint for injuries to a pedestrian on a city street made no charge that defendant's wagon was being driven at improper speed, a requested charge, predicated in part on a finding of excessive speed, was properly refused.

Trial—Use of Streets—Actions for Injuries—Instructions—Assumption of Facts.

5. A requested instruction that a person who sees no wagon approaching for a sufficient distance to warrant a cautious person in

believing it is safe to attempt a crossing has a right to proceed, relying upon the assumption that a warning would be given of an approaching vehicle, is erroneous as assuming that it was the duty of a driver to give a warning, which was a question of fact for the jury.

Trial—Use of Streets—Requested Instructions—Modification.

6. Where a complaint for injuries to a pedestrian on a city street did not charge the driver of the wagon with losing control thereof, it was proper for the trial court to modify a requested instruction that it was the duty of travelers by vehicles to keep the same under control so as not to injure pedestrians in the proper exercise of their rights, so as to charge that it was the duty of each to exercise reasonable care under the circumstances.

ON MOTION TO RETAX COSTS.

Costs—Costs on Appeal—Expense of Transcript.

7. One who successfully appeals from a judgment in an action at law may not have the expense of transcribing the testimony taxed as a disbursement in the appellate court.

Costs—Costs on Appeal—Expense of Transcript.

8. The rule that expenses incurred by an appellant in a law case in procuring a transcript must be taxed below as costs, and cannot be so taxed on appeal, is not changed because under Article VII, Section 3 of the Constitution, as amended in 1910, "either party may have the whole testimony attached to the bill of exceptions," thus transmitting the transcript to the appellate court on appeal.

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is an action by Samuel Delovage against the Old Oregon Creamery Company, a corporation, to recover damages for personal injuries said to have been sustained by the plaintiff in a collision with the defendant's wagon. The complaint states, in substance, that the plaintiff was walking along Washington Street in Portland, and when he came to the intersecting West Park Street, he looked around before starting across the latter highway. Having proceeded a short distance, he noticed a large truck coming from the south, and stopped to allow it to pass. The principally essential allegation of his first pleading here follows:

"While he was so standing and in full view, the defendant, through its agent and employee, driving a horse and one of its delivery wagons, came down Washington Street in said city going east, and suddenly turned from said Washington Street into West Park, going south, and with plaintiff in full view came behind him and, without regard to plaintiff's rights, the said defendant through its agents and employees drove said horse and delivery wagon without regard to plaintiff's position so carelessly, negligently and recklessly and without warning to the plaintiff as to strike plaintiff, throwing him down and dragging him for a considerable distance, thereby fracturing the fibula and internal malleolus of the left leg, and also producing a fracture of the metatarsal bone of the right foot."

The remainder of the declaration recounts his injuries and alleges his damages. The answer denies all the statements of the complaint and affirmatively imputes to the plaintiff contributory negligence, all of which is traversed by the reply. On the features involved on this appeal the court instructed the jury as follows:

"Pedestrians and vehicles of all kinds have equal rights on the street. Whatever the rule may be in the country, on a paved street, in the city, people have a right to cross and recross and go along the street without reference to vehicles, except that they must exercise reasonable care under the circumstances under which they move, and the vehicle must also exercise reasonable care under the circumstances in which it moves. The parties owe each other reciprocal duties of reasonable care commensurate with the situation, and with their respective ages and intelligences.

"If this occurrence was a pure accident, that is, if it could not have been avoided, why nobody is responsible. If it resulted from the negligence of the employees of the creamery company, without contribu-

tory negligence on the part of the plaintiff, then the company is liable.

"Contributory negligence, under the law of this state, is an absolute defense, without reference to the degree of it. If Mr. Delovage failed in any degree to exercise reasonable care under the circumstances shown, and the employees avoided—if Mr. Delovage failed to exercise reasonable care, that ends it. * *

"(1) The failure of a pedestrian to look and listen for approaching teams as he passes over a crosswalk at a junction of two streets is not necessarily such negligence as will prevent recovery if he is run over by a passing team. Notice, gentlemen, the word 'necessarily' as to the failure to stop and look is not 'necessarily' negligence."

"(3) A pedestrian has the legal right to travel on foot upon the traveled way, but whether he acts with reasonable care in leaving the sidewalk or the traveled way at any time depends upon whether his conduct under the circumstances conforms to that of an ordinary prudent person under the circumstances.

"(4) A pedestrian has the right to cross a street at any point, exercising reasonable care for his own safety. So he has a right to cross a street between its regular crossings, but he is bound when doing so to be reasonably careful.

"(5) A pedestrian and travelers in wagons have equal rights in the street, and while the sidewalk is the place for pedestrians alone, yet they have the right also to walk across or along the street, and it is the duty of both pedestrian and travelers by vehicle to recognize the right of each to be upon the street, and it is the duty of each to exercise reasonable care under the circumstances."

The numbered instructions were given at the request of the plaintiff, except that No. 5 was modified as hereinafter stated. The court refused to give the following instructions requested by the plaintiff:

“(2) There is no rule of law which makes it negligent for a person to stand in the street for a few moments when he has taken proper precaution to look for approaching vehicles.”

“(6) A person who looks and sees no wagon approaching for a sufficient distance to warrant a cautious person to believe that it is safe to attempt to cross a crossing has the right to proceed, relying upon the assumption that a warning would be given of an approaching vehicle at any excessive speed, and which was not in sight when he left the sidewalk, and the absence of additional facts calling for the exercise of greater vigilance cannot be said to be negligence, as a matter of law, if he does not thereafter look in the direction from which danger happens to come.”

The modification of No. 5 consisted in striking out these words, “And it is the duty of travelers by vehicles to keep the same under control so as not to injure pedestrians in the proper exercise of their rights,” and substituting for them this clause, “And it is the duty of each to exercise reasonable care under the circumstances.” The jury returned a verdict for the defendant, and on motion of the plaintiff the court set aside the resulting judgment and granted a new trial, assigning as a reason therefor that “the court failed to give instructions 2 and 6, requested by plaintiff, and improperly modified instruction 5.” From this order the defendant appealed.

REVERSED AND REMANDED.

For appellant there was a brief with oral arguments by *Mr. John C. Shillock* and *Mr. John J. Fitzgerald*.

For respondent there was a brief over the name of *Messrs. Bernstein & Cohen*, with an oral argument by *Mr. Alex Bernstein*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The order setting aside the judgment and ordering a new trial is appealable: Section 548, L. O. L. The standard by which the correctness of the trial court's action in such cases is to be judged is thus laid down by Mr. Justice MOORE in *L. C. Smith & Bros. Typewriter Co. v. McGeorge*, 72 Or. 523 (143 Pac. 905):

"Under the provisions of this statute, the right of a Circuit Court to set aside a judgment and grant a new trial can be exercised only when in the trial of a cause an error has been committed which is so prejudicial to the defeated party that the judgment rendered against him would, if allowed to remain in force, be reversed on appeal. When the trial court, within the time allowed, discovers that such a mistake of law has been made, it may, *sui sponte* or on motion, correct the error by setting aside the judgment and granting a new trial, thereby avoiding the necessity of and the expense that would be incurred by an appeal: *De Vall v. De Vall*, 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291); *Taylor v. Taylor*, 61 Or. 257 (121 Pac. 431, 964); *Sullivan v. Wakefield*, 65 Or. 528 (133 Pac. 641)."

2. That negligence is a question of fact to be determined by the jury is stated in *Palmer v. P. Ry. L. & P. Co.*, 56 Or. 262 (108 Pac. 211); *Sullivan v. Wakefield*, 59 Or. 401 (117 Pac. 311); *Kovachoff v. St. Johns Lbr. Co.*, 61 Or. 174 (121 Pac. 801).

3. It is contended that error was committed in the refusal of plaintiff's requested instruction No. 2. That is an adaptation of language used in *Doyle v. Foster*, 128 App. Div. 281 (112 N. Y. Supp. 675), and *Berler v. Kane*, 139 App. Div. 76 (123 N. Y. Supp. 836), cited by the plaintiff. In those cases the trial court had

proceeded upon the theory that as a matter of law a person standing in a street in the city of New York was guilty of such contributory negligence as would defeat his right to recover, and it was about this situation that the courts used the language substantially embodied in the request of the plaintiff here under consideration. When applied to the case there, the statement of the rule is correct; but the converse is not true. We cannot say conclusively that under all conditions a man is in the exercise of due care when he uses his privilege of standing in the street. Remembering that the question of negligence is one of fact for the jury, this instruction, if given, would have been misleading because it implies that as a matter of law the plaintiff would not be negligent under the circumstances if he stood in the street after having looked for approaching vehicles. A footman might look out into the street and see a runaway team coming, but it would be negligent for him to claim his right to stand in the thoroughfare and go out in front of the team. Yet the application of the instruction asked by the plaintiff would permit just such conduct. .

4. The vice of instruction No. 6 is predicated in part upon the hypothesis that there was excessive speed involved, whereas no such charge is made in the complaint; and hence in that respect the instruction was abstract. It was not framed according to the issues raised by the pleadings. It was properly refused in the first instance.

5. Again, it is faulty in assuming as a legal conclusion that the failure of the driver of a vehicle to give warning of its approach is negligence. This would invade the province of the jury. We cannot draw the conclusion as a matter of law that there is, in all cases, negligence where one fails to give warning that his

wagon is coming. It depends upon the circumstances of the case and must be left to the consideration of the jury.

6. The defect in plaintiff's requested instruction No. 5 as propounded by him is in the use of this language:

"And it is the duty of travelers by vehicles to keep the same under control so as not to injure pedestrians in the proper exercise of their rights."

Again we note that the defendant is not charged with losing control of its vehicle, and the court properly struck out the excerpt quoted, and in lieu thereof added this:

"And it is the duty of each to exercise reasonable care under the circumstances."

The language of the request which we have noted would seem to impose a duty on the driver without reference to the reciprocal obligation of the footman. The amendment cured the partiality of such words, and properly declared the rule applicable to such cases.

A review of the instructions given by the court at the trial convinces us that no error was committed therein, and that nothing contained in the charge would have worked out a reversal of the judgment in this court on appeal. Correct as the court was in the first instance, it was wrong for it to overturn its own conclusion. Having a case with regular pleadings, no error being assigned upon the reception or rejection of testimony, the jury, under proper instructions about the law, rendered its verdict for the defendant, and that constitutes a final determination of the facts involved. A corresponding judgment is inevitable.

The order setting aside the first decision and granting a new trial will therefore be reversed and the cause remanded, with instructions to the Circuit Court to enter judgment for the defendant on the verdict.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Denied June 15, 1915.

ON MOTION TO RETAX COSTS.

(149 Pac. 317.)

Department 2. Statement by MR. JUSTICE HARRIS.

An order granting plaintiff's motion for new trial was reversed and remanded on defendant's appeal, and the defendant now moves to retax the costs.

MOTION DENIED.

Mr. John C. Shillock and Mr. John J. Fitzgerald, for the motion.

Mr. Alex Bernstein, contra.

MR. JUSTICE HARRIS delivered the opinion of the court.

1, 2. This is a motion to retax costs. Having prevailed in this court, the appellant filed a cost bill, which includes an item of \$50.90 for the transcript of the testimony. The appeal was from a judgment in an action at law, and a firmly established rule has denied the right of an appellant to have the expense of transcribing the testimony in an action at law taxed as a dis-

bursement in this court: *Ferguson v. Byers*, 40 Or. 468, 477 (67 Pac. 1115, 69 Pac. 32); *Allen v. Standard Box & Lumber Co.*, 53 Or. 10, 19 (96 Pac. 1109, 97 Pac. 555, 98 Pac. 509); *Sommer v. Compton*, 53 Or. 341 (100 Pac. 289); *Boothe v. Farmers & Traders' Nat. Bank*, 53 Or. 576, 588 (98 Pac. 509, 101 Pac. 390); *McGee v. Beckley*, 54 Or. 250, 254 (102 Pac. 303, 103 Pac. 61); *De Vall v. De Vall*, 57 Or. 146 (109 Pac. 755, 110 Pac. 705). It is contended that the practice sanctioned by repeated decisions must of necessity be changed because by the terms of Article VII, Section 3, of the state Constitution as amended in 1910, "either party may have attached to the bill of exceptions the whole testimony." A decision of the identical question presented by this motion has been made and is now *stare decisis*. In *West v. McDonald*, 64 Or. 203, 209 (128 Pac. 818), this court said:

"It has been held many times by this court that the expenses incurred by the appellant in procuring a transcript of the evidence in the Circuit Court must be taxed there, and will not be included in the cost bill in this court. * * And the situation is not changed by the fact that now the transcript of testimony in law cases may be transmitted to this court on appeal. The appellant, having no opportunity to present his costs to the Circuit Court, after a reversal of the case and the return of the mandate to that court, has an opportunity to file his cost bill for the costs incurred in that court; and there is no reason to change the rule announced in the cases above cited."

The motion to retax costs is therefore denied.

MOTION DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and
MR. JUSTICE BURNETT concur.

Argued May 4, affirmed May 18, rehearing denied June 15, 1915.

MORGAN v. GRANDE RONDE LUMBER CO.*

(148 Pac. 1122.)

Master and Servant—"Railroad" Employees.

1. The word "railroad" in Section 6946, L. O. L., making every corporation operating a railroad liable for injuries sustained by employees by the default of coemployees, includes a logging railroad used exclusively by the owner.

[As to kind of railroad intended by rule abrogating fellow-servant doctrine as to railroad employees, see note in Ann. Cas. 1912D, 648.]

Master and Servant—Injury to Servant—Evidence.

2. Where a section-hand on a logging railroad was ordered to assist in loading a train, and when the loading was completed, the foreman directed the men to get aboard, the section-hand while on the train, was entitled to protection as such.

Master and Servant—Injury to Servant—Contributory Negligence.

3. Whether a section-hand on a logging railroad was guilty of negligence in riding on a logging train, by orders of the foreman, *held*, for the jury.

Master and Servant—Injury to Servant—Contributory Negligence.

4. Whether a section-hand was negligent in riding with his feet hanging over the edge of a flat car in a logging train, in violation of orders *held*, for the jury.

Master and Servant—Injury to Employee—Contributory Negligence.

5. Whether an employee on a logging train, running away on a down grade, was guilty of contributory negligence in jumping from the train, *held*, under the evidence, for the jury.

Master and Servant—Injury to Servant—Care of Employer.

6. An employer, maintaining a logging railroad and carrying employees to load logging trains, must use reasonable precautions to protect them from injury.

Master and Servant—Injury to Servant—Care Required of Employer.

7. Whether an employer maintaining a logging railroad and operating thereon logging trains was guilty of negligence in failing to maintain the track in a reasonably safe condition and to furnish a locomotive properly equipped, *held*, for the jury.

From Union: JOHN W. KNOWLES, Judge.

*As to applicability to private railroad of statutes abrogating the fellow-servant rule as to railroads, see notes in 15 L. R. A. (N. S.) 479 and 45 L. R. A. (N. S.) 841.

As to whether street or interurban railways are within the meaning of statutes abrogating the fellow-servant rule as to railroads, see note in 17 L. R. A. (N. S.) 117.

REPORTER.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an action by Peter Morgan against the Grande Ronde Lumber Company, a corporation, to recover for personal injuries. The testimony on behalf of plaintiff shows the following facts: Defendant, at the times mentioned in the complaint, operated a sawmill at Perry, Oregon, and in connection therewith operated a railroad from a point near Hilgard, Oregon, to a point in the Blue Mountains about 15 miles distant. About 10 miles out from Hilgard was located one of its logging camps. The defendant used this railroad for the purpose of hauling logs from the mountains to Hilgard, and thence over the Oregon-Washington Railroad & Navigation tracks to Perry. Plaintiff was employed by defendant as a section-hand upon its railroad. In performing the work plaintiff rode upon defendant's cars, sometimes as a matter of necessity in carrying on the work, sometimes as a matter of convenience, but at all times with the knowledge and permission of defendant. On the 8th day of June, 1913, defendant sent a train, consisting of an engine and two flat cars, over a part of its track about six miles long, from its camp in the mountains, to where was piled some ties and a small house, all of which were to be loaded upon the train. Plaintiff, as a section-hand, rode upon that train and helped load the ties. There had not been a train over this track since about the 10th of January, 1913. There had been no inspection of this track prior to this train going over it. Plaintiff's testimony is to the effect that grass had grown quite high over this track. Defendant, by its witnesses, denied this fact. It further appeared that the engine which took this train over this track was sanded the night before at Perry; that the only place where

the company kept sand for its engines was at Perry. After the ties and house were loaded upon the cars, the foreman in charge of the train shouted, "All aboard," and all but two of the men got on the cars. It further appears in the testimony that the engineer in charge of the train was not the regular man on the run, but was regularly a brakeman or a conductor, and handled the engine in switching, having often taken it over the track where the accident occurred. He had handled it for several years, but no other engines. The grade upon this road at the place of plaintiff's injury was about 5 per cent, and there were places on the road where the grade was much greater. After the men had boarded the train, the foreman gave the sign for starting out. The engineer started the train and went about five or six car-lengths, when he lost control and shouted to the foreman to jump off, and the foreman shouted, "Jump off," and the men began to jump off. Plaintiff jumped, and, in some manner unknown to himself, was thrown beneath the cars and had both legs crushed, so that one had to be amputated about seven inches below the knee, and the other foot was taken off. There was a verdict and judgment for plaintiff, from which defendant appeals.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Charles H. Finn*.

For respondent there was a brief with oral arguments by *Messrs. Cochran & Eberhard*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. As a preliminary question in this case it is urged by defendant that the term "railroad," used in Sec-

tion 6946, L. O. L., does not apply to logging roads used exclusively for the purposes of the owner and not possessing the attributes of common carriers. The case was tried by plaintiff upon the theory that it was one within this statute, which to a great extent eliminates the defense of assumption of risk, and imposes other duties upon the employer beyond those existing at common law. The section referred to reads as follows:

“Every corporation operating a railroad in this state, whether such corporation be created under the laws of this state, or otherwise, shall be liable in damages for any and all injury sustained by any employee of such corporation as follows: When such injury results from the wrongful act, neglect, or default of an agent or officer of such corporation, superior to the employee injured, or of a person employed by such corporation having the right to control or direct the services of such employee injured, or the services of the employee by whom he is injured; and also when such injury results from the wrongful act, neglect, or default of a coemployee engaged in another department of labor from that of the employee injured, or of a coemployee on another train of cars, or of a coemployee who has charge of any switch, signal point, or locomotive engine, or who is charged with dispatching trains or transmitting telegraphic or telephonic orders. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such corporation shall not of itself be a bar to recovery for any injury or death caused thereby. When death, whether instantaneous, or otherwise, results from an injury to any employee of such corporation received as aforesaid, the personal representative of such employee shall have a right of action therefor against such corporation, and may recover damages in respect thereof. Any contract or agreement, express or implied, made by any such employee to waive the benefit of this section, or any part

thereof, shall be null and void, and this section shall not be construed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this state."

It will be seen that the statute in its terms is broad enough to include all railroads. Its evident object is to protect employees from the dangers incident to the operation of locomotives and trains; and this danger is even greater upon logging railroads than upon those which are used as common carriers, so that there would seem no good reason to make a distinction by construction where the law has made none by its language. This view is supported by the great weight of authority: *Keystone Mills v. Chambers* (Tex. Civ. App.), 118 S. W. 178; *Hemphill v. Buck Creek Lumber Co.*, 141 N. C. 487 (54 S. E. 420); *Lodwick Lumber Co. v. Taylor*, 39 Tex. Civ. App. 302, 87 S. W. 358; *Carter v. Coharie Lumber Co.*, 160 N. C. 8 (75 S. E. 1074); *Mace v. Boedker*, 127 Iowa, 721 (104 N. W. 475); *Kline v. Minn. Bridge Co.*, 93 Minn. 63 (100 N. W. 681); *Cunningham & Co. v. Neal*, 101 Tex. 338 (107 S. W. 539, 15 L. R. A. (N. S.) 479).

2. It is next contended that the plaintiff was not injured while in the employ of the company, but that, his day's work having been completed when the cars were loaded, his duty to his employer and the employer's duty to him ceased, and that if he elected to ride home on the car instead of walking he did so at his own risk. This contention is not borne out by the facts. The testimony shows that plaintiff was regularly employed by the defendant at a wage of \$2.25 a day, and had been so employed for several months; that he was a section-hand and was ordered to go out upon the train to assist in loading it with ties which were piled at the end of the track several miles

away in the mountains; that the track had not been used for several months, and was in such condition that it had to be repaired at one or two places to render it passable; that when the loading was completed the foreman directed the men to get aboard, and the plaintiff and all the others but two did so. There is nothing to indicate that his employment had ceased when the ties were loaded. He was under pay and in the employment of the company when he went out to his work, and was still under pay and in its employment when he got on the car to return. It is true he might have walked through the woods, and as events proved it would have been better for him to have done so, but it would have been an unusual and extraordinary act under the circumstances. Two out of the 18 men who composed the crew did in fact walk home, but they were probably familiar with the dangers of the road, while the testimony shows that plaintiff had not been over that portion of it before the day of the accident.

Several assignments of error are made in the brief, all relating to the contributory negligence of plaintiff. They may be grouped as follows: (1) That he was negligent in riding upon the car instead of walking home: (2) that he was negligent in riding with his feet hanging over the edge of the flat car; (3) that he was negligent in not remaining on the car instead of jumping off.

3. To the first objection it may be answered that it was a matter for the jury to determine whether he knew or appreciated the danger to which he was exposed, and voluntarily assumed it when he obeyed the directions of the foreman and went upon the car; and upon that circumstance they have, by their verdict, found in favor of the plaintiff. To a common laborer,

unfamiliar with the operation of a locomotive or with railroad operation of any kind, a danger which would be obvious to a skilled engineer might not be apparent, and he had a right to assume that the company had furnished a locomotive sufficiently equipped and with power enough to prevent its running away upon the heavy grades known to exist upon this portion of the road, and with an engineer possessing sufficient knowledge and caution to see that the equipment was kept in order and properly used. There was a question as to the competency of the engineer, and also a question as to whether there was a sufficient amount of sand in the sand boxes and dome; and the jury had a right to find, and probably did find, that plaintiff's theory that the running away of the train was caused by the failure to apply sand enough to overcome the slippery condition of the rails was correct.

4. As to the second suggestion that the plaintiff was negligent in assuming the position which he did upon the car, it is clear that this was purely a question of fact for the jury. The foreman testifies that he had ordered all the employees not to ride in this manner. The plaintiff denies that any such direction or caution was ever given him, and it was a question for the jury as to which witness was to be believed. But conceding that the direction had been given, the jury were the final judges as to whether plaintiff's disobedience of the order contributed in any way to his injury.

5. The suggestion that plaintiff was negligent in jumping was for the jury. The foreman jumped and ordered the men to jump, and all including the engineer did jump except two. The general judgment seems to have been that it was safer to jump than to stay on the train and take chances in the inevitable smash-up. Plaintiff found himself in a position of sudden and im-

minent peril, where it was necessary for him to choose between two dangerous courses of action, and it was for the jury to say whether he acted with ordinary prudence under the circumstances: *Kleiber v. People's R. Co.*, 107 Mo. 240 (17 S. W. 946, 14 L. R. A. 613, and cases there cited).

6, 7. There was evidence of defendant's negligence sufficient to justify the verdict of the jury. It is true that much of the evidence of plaintiff's witnesses was contradicted by the defendant; but where there is any substantial testimony to justify a verdict, and a verdict is rendered in accordance with it, we must assume such testimony to be true. Therefore we must assume that the track where the accident happened was overgrown with grass, which, when mashed down upon the track, caused it to become slippery; that there was a deficiency of sand so that sufficient traction could not be obtained to hold the train and prevent its running wild. It was the duty of defendant to furnish plaintiff a reasonably safe place to work, which includes a reasonably safe track and locomotive properly supplied and equipped while going to and returning from the place where the actual physical labor was to be performed. Defendant had a right to require its employees to walk to and from their labors—it was “all in the day's work”—but when for its own convenience, or theirs, or both, it undertook to carry them, it should have used reasonable precautions to protect them from injury, and what is a reasonable precaution is to be judged by all the circumstances, and is a question of fact for the jury. Of course, nobody could expect the same elaborate care upon a logging road, which is temporary in its character, as upon a road largely used for commercial purposes; but such precautions as furnishing competent engineers, removing

obvious dangers from the vicinity of the rails, seeing that sand, which is so necessary when negotiating heavy grades, is supplied in sufficient quantities, are duties which cannot be disregarded even when the structure is only temporary. There was evidence tending to show that the defendant was derelict in some, if not all, of these respects; and, while it might not satisfy every member of the court if they were sitting as triers of the facts, it did satisfy the jury; nor is it weak when the whole circumstances are considered. According to defendant's testimony the locomotive was all right, the brakes were all right, the engineer was competent, there was plenty of sand, and the track was free of weeds; and yet before the train had gone a hundred feet it got beyond control and ran away, and the only reason or excuse offered is that there had been a shower of a few minutes' duration which had made the track slippery. Jurors are likely, under these circumstances, to conclude that the reason given is not adequate to account for the accident, and to decide that the plaintiff's theory of an overgrown track, lack of sand, and an inexperienced engineer more reasonably accounts for its occurrence.

By reason of the statute the doctrine of assumption of risk is not in this case, and a discussion of that subject is unnecessary.

Taken as a whole, the charge of the court was exceedingly fair to the defendant, and fully and correctly stated the law. Finding no material error, the judgment is affirmed. **AFFIRMED. REHEARING DENIED.**

Argued July 13, reversed July 27, 1915.

THIELKE v. ALBEE.*

(150 Pac. 854.)

Municipal Corporations—Initiative and Referendum Powers—Constitutional Provisions.

1. Section 1a, Article IV, Constitution, reserving to the voters of every municipality the initiative and referendum powers as to all municipal legislation, and Article XI, Section 2, granting to the voters of every city power to enact a municipal charter subject to the Constitution and criminal laws, the common council of the city may not initiate an ordinance and submit it to a vote of the people as an initiative measure without first passing it.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is a suit by A. A. Thielke, George R. Barker and W. J. Christenson against H. R. Albee, Mayor of the City of Portland, to enjoin the defendant from enforcing the provisions of an ordinance of the City of Portland, commonly called the "jitney ordinance." The complaint states that plaintiffs are each the owners and operators of automobiles carrying passengers for hire, and alleges facts sufficient to bring them within the terms of the alleged ordinances and contains among others, the following averments:

"That on April 2d, the city council of the said City of Portland passed an ordinance, entitled 'An ordinance, licensing and regulating motor busses operated within the City of Portland,' which ordinance is in the exact words and figures, and is to all intents and purposes, the same identical ordinance as the one hereinafter set out and annexed to this complaint and marked 'Exhibit A'; that immediately after said city council passed said ordinance on April 2, 1915, the

*For authorities dealing with initiative and referendum, see notes in 11 L. R. A. (N. S.) 1092; 33 L. R. A. (N. S.) 969; 50 L. R. A. (N. S.) 196.

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plaintiffs, with other citizens of said city, demanded a referendum vote thereon, and filed with the auditor of said city, on or about May 2, 1915, a petition of legal voters, asking for such referendum; that said petition contained over 10 per cent of the total registered voters of said city, and was in all respects sufficient, and the referendum was thereupon automatically ordered for the regular city election to be held in said city the first Monday in June, 1917, it being required that said referendum be ordered at least 60 days before the election at which it was submitted, and it being also requisite under the state law that 60 days' notice be given to the voters in order that they might qualify themselves intelligently to vote upon any measure submitted to them under the referendum clause of the Oregon system of direct legislation; that upon the referendum being invoked as aforesaid, the jurisdiction of the said city council over said ordinance was wholly ended; that said city council, in defiance of law, and desiring to evade the law, and to force said ordinance to a vote at the election on June 7, 1915, did, on May 12, 1915, unlawfully, and under the forms of councilmanic procedure, assume to repeal said ordinance upon which the referendum had been so ordered; that said council, finding that a charter provision stood in the way of its passing its said alleged ordinance of repeal on May 12, 1915, because no ordinance, except an emergency ordinance, could be passed on the day of its introduction, did willfully, designedly, unlawfully and with purpose to evade the law of the State of Oregon, attach to its said alleged ordinance repealing the ordinance first aforementioned a so-called emergency clause, the emergency assigned being that the 'health and safety of the community' demanded its repeal; that said council thereupon, and at its same sitting on said 12th day of May, 1915, and in pursuance of its aforesaid unlawful design to force said ordinance to a vote at the city election on June 7, 1915, did order the same identical ordinance referred to a vote of the people at said June 7, 1915, election; that said action of said city council of May 12, 1915, assuming to re-

peal the ordinance first aforementioned, upon which the referendum had been ordered for June, 1917, was illegal and void for the reasons stated, and that the action of said city council, which immediately followed, in ordering the same ordinance submitted to a vote of the people for June 7, 1915, was premature and void for the reasons stated, and for the reason that the council had lost all jurisdiction over said ordinance."

The complaint contained other averments alleging unreasonable and confiscatory provisions of the ordinance which it is not necessary to consider here. There was a general demurrer to the complaint, which being sustained, plaintiffs appeal. REVERSED.

For appellants there was a brief over the names of *Mr. A. W. Lafferty*, *Mr. R. L. Merrick* and *Mr. D. E. Powers*, with an oral argument by *Mr. Lafferty*.

For respondent there was a brief with oral arguments by *Mr. Walter P. La Roche*, City Attorney, and *Mr. H. M. Tomlinson*, Deputy City Attorney.

There was a brief filed by *Messrs. Stapleton & Conley*, *amici curiae*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. From the allegations of the complaint it appears that the original ordinance passed by the council was repealed, and that the same ordinance, after being repealed, and therefore dead for any purpose, was submitted to the people by the council as an initiative measure. For the purposes of the demurrer said allegations must be taken as true. Conceding that the council had a right to repeal the ordinance after it had been referred, and that it had the right to pass an-

other ordinance identical in terms with the one repealed and to submit it to a vote at the election next ensuing, we are of the opinion that it went beyond its powers in submitting to a vote of the electorate an ordinance not passed by it. Article IV of the Constitution, as amended in 1902, provides that the people reserve unto themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independently of the legislative assembly, and prescribes the procedure by which these powers may be exercised, but nowhere does it grant to the legislature any power to initiate laws, except constitutional amendments, and submit such laws to the vote of the people, without itself first enacting them in the form of laws. Constitutional amendment of Section 1a of Article IV, adopted in 1906, extends this right to municipalities in the following language:

“The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than 10 per cent of the legal voters may be required to order the referendum nor more than 15 per cent to propose any measure, by the initiative, in any city or town.”

Article XI, Section 2, of the Constitution, as amended in 1906, provides:

“The legal voters of every city and town are hereby granted power to enact and amend their municipal

charter, subject to the Constitution and criminal laws of the State of Oregon."

In none of these provisions is there conferred power upon the legislature to initiate a law, or upon the city council to initiate an ordinance; and we are cited to no provision of the state statute or charter of Portland which confers this right. The ordinance, with one or two exceptions which could well be eliminated, without holding the whole void, seems to be fair and reasonable, and the need of such regulation is, no doubt, imperative; but upon the showing made in the complaint there was no authority in the council to submit it as an initiative measure.

The order of the Circuit Court is therefore reversed and the cause remanded, with directions to the Circuit Court to permit an answer to be filed within such time as it may deem reasonable.

REVERSED.

Argued May 4, affirmed May 25, rehearing denied June 15, 1915.

WAGNER v. WALLOWA COUNTY.*

(148 Pac. 1140.)

Deeds—Condition Subsequent—Effect—Statutes.

1. Under Sections 7102, 7103, L. O. L., providing that a deed of real estate shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied, where plaintiff deeded land to a county, the deed reciting "that this conveyance is made and accepted on condition that certain described real estate is to be used for a site for a high school, and for no other purpose, and, if not so used for such

*As to condition in deed that land is to be used for a specified charitable, public or quasi-public use, see note in 19 L. R. A. 262.

Upon the subject of transferability of a right of entry for condition broken in a deed, see note in 60 L. R. A. 750; and as to the effect of a conveyance prior to a re-entry, see note in 60 L. R. A. 754.

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purpose, title shall revert to the grantors," the conveyance was of a fee-simple estate, subject to defeasance by the happening of a condition subsequent, and not a conveyance of a base or determinable fee.

[As to conditions subsequent in deeds, see note in 31 Am. St. Rep. 46.]

Deeds—Ejectment—Right of Action—Breach of Condition Subsequent.

2. Where a grantor of an estate in land in fee simple, subject to defeasance on the happening of a condition subsequent, conveyed to a third person before the happening of the condition, the conveyance passed no right of re-entry.

Deeds—Condition Subsequent—Waiver of Breach—Deed to Third Party.

3. Where the grantor of land to a county for school purposes, subject to the condition that title should revert to him upon failure to use for such purposes, conveyed, before the happening of such condition, to a third person, such conveyance, although inoperative to give such third person a right of entry for breach of condition, nevertheless operated as a waiver of the condition by the grantor, preventing his ever asserting a right of entry against the grantee county for breach of condition.

Estoppel—What Constitutes—Right of Entry.

4. When a grantor of land subject to a defeasance for condition broken conveys any interest to a third person before such breach, he is thereafter estopped to assert a right of entry.

[As to when and at whose instance a deed may be avoided for breach of condition subsequent, see note in 44 Am. Dec. 743.]

Estoppel—Assignment of Right of Re-entry—Persons for Whom Available—Privity.

5. In an action in ejectment by an original grantor, to recover for an alleged breach of condition subsequent, from the original grantee, lands conveyed on fee condition, the fact that such grantor had, subsequent to his deed and prior to any alleged breach, conveyed the lands to another is available as a defense against such grantor; there being such a privity of estate in the land as to give effect to the subsequent deed to a stranger.

From Wallowa: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action of ejectment in the usual Code form, wherein A. M. Wagner is plaintiff and Wallowa County, Oregon, is defendant, to recover the possession of certain realty in Wallowa County. The defendant denies all the allegations of the complaint,

except its own corporate entity. It pleads that it alone is the owner in fee simple and in possession of the property. Another defense is thus stated:

“That plaintiff ought not to be allowed to maintain this action, for that on or about the 7th day of September, 1906, this plaintiff and his then wife, Isabelle C. Wagner, for a valuable consideration, duly made, executed and delivered to this defendant a certain instrument in writing, purporting to be a warranty deed, a copy of which warranty deed is hereto attached and marked ‘Exhibit A,’ and by this reference made a part hereof. That in and by the provisions of said deed the real property described in plaintiff’s complaint was bargained, sold and conveyed unto this defendant. That said deed further contained the following conditions subsequent, immediately after the description of the land, to wit: ‘For the purpose of a site, or part of a site, for a county high school and buildings connected therewith; and it is understood that this conveyance is made and accepted on condition that said described real estate is to be used for a site, or a portion of a site, for a county high school and buildings connected therewith and for no other purpose; and, if not so used for such purpose, the title to said real estate shall revert back to the grantors herein.’ That thereafter, and on or about the 19th day of October, 1912, while defendant was in possession and lawfully seised of the said real property, and at a time when said condition aforesaid was duly and fully performed, and prior to any alleged breach of said condition on the part of defendant, this plaintiff and his said wife did, for a valuable consideration, make, execute and deliver to school district No. 21 of Wallowa County, Oregon, a municipal corporation, a certain written instrument, purporting to be a warranty deed, a copy of which said warranty deed is hereto attached and marked ‘Exhibit B,’ and by this reference made a part hereof. That by reason of the said deed of plaintiff, so made, executed, and delivered to said school district No. 21, said condition so named

in said deed from said plaintiff and wife to this defendant was fully and wholly discharged, and said plaintiff became thereby and is estopped from claiming any right, title or interest to said land under and by virtue of said condition."

The case was tried upon an agreed statement of facts, from which it appears that under the act of the legislative assembly of this state of February 26, 1901, entitled "An act to authorize the organization and maintenance of district and county high schools in this state," it was determined by the people of Wallowa County to establish a high school. After considering certain propositions from several towns, the County Court concluded to locate the institution at Enterprise, and accepted from the plaintiff and his wife a deed to the premises in dispute, in these words:

"Know all men by these presents, that we, Alonzo M. Wagner and Isabelle C. Wagner (husband and wife), in consideration of the sum of one dollar, to us paid by Wallowa County, Oregon, do hereby remise, release and forever quitclaim unto the said Wallowa County, Oregon, and to its successors and assigns, all our right, title and interest in and to the following described parcel of real estate, situate in said county of Wallowa, State of Oregon, to wit: All of block numbered one (1) of Wagner's Addition to the town of Enterprise, as shown by the plat of said addition on record in the office of the county clerk of said county, for the purpose of a site, or part of a site, for a county high school, and buildings connected therewith; and it is understood that this conveyance is made and accepted on condition that said described real estate is to be used for a site or portion of a site for a county high school, and buildings connected therewith, and for no other purpose; and if not so used for such purpose, the title to said real estate shall revert to the grantors herein. To have and to hold the same, together with all and singular the hereditaments and

appurtenances thereunto belonging or in any wise appertaining to the said Wallowa County, Oregon, and to its successors and assigns forever, for the purposes above mentioned. In witness whereof, we have hereunto set our hands and seals this 7th day of September, 1906.

“ALONZO M. WAGNER. [Seal.]
“ISABELLE C. WAGNER. [Seal.]”

This instrument was duly executed, acknowledged and recorded. During the spring and summer of 1907 the county erected a building on the premises for high school purposes, furnished the same all at a total cost of about \$25,000, and thereafter maintained a county high school therein up to and including June 1, 1913. It further appears that, upon the initiative petition of certain voters of Wallowa County, a bill was proposed at the general election of November, 1912, for a local law to abolish and discontinue the county high school of Wallowa County, and forbidding the expenditure of public money in its support after the current taxes levied for that purpose had been exhausted. This bill was adopted as a law at the general election of November 5, 1912, and was proclaimed as such by the executive of the state later in the same month. In October, 1912, prior to the election and before any default in the maintenance of the school on the premises had been committed, the plaintiff and his wife made, executed and delivered to school district No. 21 of Wallowa County the following deed:

“Know all men by these presents, that Alonzo M. Wagner and Isabelle C. Wagner, his wife, of Enterprise, county of Wallowa, State of Oregon, in consideration of one dollar and other valuable considerations, to them paid by school district No. twenty-one (21), of Wallowa County, State of Oregon, have bargained and sold and by these presents do grant, sell

and convey unto said school district No. twenty-one (21), its successors and assigns, all the following bounded and described real property, situate in the county of Wallowa, and State of Oregon, to wit: All of block No. one (1) of Wagner's Addition to the town of Enterprise, as shown by the plat of said addition on record in the office of the county clerk of said county and state, together with the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and also all the right, title and interest of the grantors therein or thereto, and to every part thereof, subject to the present estate and interest therein of Wallowa County, Oregon, heretofore created and conveyed to said county by deed of these grantors dated September 7, 1906, and recorded at page 71 of volume O of the Records of Deeds of said county. This conveyance is made by the grantors and accepted by the grantee upon the express condition that, upon the termination of the estate of Wallowa County therein, the said described real property shall be used for district high school purposes under the laws of the State of Oregon, by said school district No. twenty-one (21), and its successors, and should the same cease to be used as such district high school, except during temporary vacations, then said real property shall revert to and become the property of the grantors herein, their heirs and assigns. To have and to hold the above-described and granted premises unto the said school district No. twenty-one (21) and its successors forever, subject to the conditions hereinbefore expressed. And the said grantors, Alonzo M. Wagner and Isabelle C. Wagner, above named, do covenant to and with the said school district No. twenty-one (21) and its successors that, while the conditions of this deed are complied with, they will and their heirs, executors and administrators, shall warrant and defend the above-granted premises, and every part and parcel thereof, to said grantee and its successors forever, against the acts and deeds of said grantors subsequent to the date of this deed, and all persons claiming by, from, through or under the said grantors by virtue

of any conveyance executed after this date by the grantors, their heirs, executors or administrators. In witness whereof we, the grantors above named, hereunto set our hands and seals this 19th day of October, 1912.

“ALONZO M. WAGNER. [Seal.]
“ISABELLE C. WAGNER. [Seal.]”

This document was also duly executed, acknowledged, and recorded. The funds raised for its support having been fully expended, the school was closed June 1, 1913, since which time the defendant county has not maintained such an institution of learning. Other statements of fact are made in the stipulation, but the foregoing are deemed sufficient for the decision of the case. After hearing the argument of counsel on the agreed statement of facts and the pleadings, the Circuit Court rendered judgment in favor of the defendant to the effect that it was the owner in fee simple and entitled to the possession of the realty, and that it should recover costs and disbursements from the plaintiff. He has appealed.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Daniel W. Sheahan*.

For respondent there was a brief over the names of *Messrs. Cochran & Eberhard, Mr. Arthur W. Schaupp, Mr. Wallace G. Trill and Mr. Orlando M. Corkins*, District Attorney, with oral arguments by *Mr. Schaupp and Mr. Colon R. Eberhard*.

MR. JUSTICE BURNETT delivered the opinion of the court.

A cognate question was before us in *School District No. 21 of Wallowa County v. Wallowa County*, 71 Or.

337 (142 Pac. 320), in which it was decided that the conveyance from the plaintiff here to the school district, prior to any breach of the condition of the deed under which this defendant claims, was inoperative to confer title upon the grantee therein because the grantor had no estate at the time which he could convey. In the instant case the plaintiff proceeds upon the theory that his conveyance to the school district was void, and hence should be disregarded. This postulate is fallacious in a certain sense. The holding in the school district case was to the effect that upon the authority of *Seeck v. Jakel*, 71 Or. 35 (141 Pac. 211, L. R. A. 1915A, 679), ejectment is the proper remedy to be employed by the grantor of real property to recover the same for breach of a condition subsequent. The opinion goes on to state:

“This remedy, however, does not inure to the one to whom the grantor in the original deed may afterward attempt to convey the premises either before or after breach of the condition. The reason is that by the first conveyance the whole estate went out of the grantor therein. He had nothing left to convey. True enough, there was a possibility that some time the title might return to him; but until it does, through his assertion of his right arising from the breach and his actual recovery of the land, there is nothing upon which his conveyance to a stranger can operate. Because the grantor may waive his right to insist that the condition subsequent has been broken, his chose in action in the premises is classed as a personal privilege to be asserted only by himself or his heirs. It is not assignable, and, until he actually recovers the land as upon breach of the condition, his deed confers no right upon his subsequent grantee”—citing authorities.

The effect of that decision must be limited to what was decided, namely, that, for want of an estate to convey, the so-called grantor could not pass title to

the property by the instrument in question there. It was not stated that the paper was utterly void for all purposes whatever, and hence entirely negligible. As we shall hereinafter show, it may operate for another purpose.

1. Counsel for the plaintiff contends with consummate skill in argument that the estate held by the defendant county under the deed to it from the plaintiff was subject to a conditional limitation, constituting a base, qualified, or determinable fee, and not merely an estate upon condition subsequent. The defendant joins issue on this contention and maintains precisely the opposite conclusion. The controversy is focused upon this language appearing in the deed under which the defendant claims:

“And it is understood that this conveyance is made and accepted on condition that said described real estate is to be used for a site or portion of a site for a county high school, and buildings connected therewith, and for no other purpose; and, if not so used for such purpose, the title to said real estate shall revert to the grantors herein.”

In *Blanchard v. Detroit, Lansing & Lake Michigan R. R. Co.*, 31 Mich. 43 (18 Am. Rep. 142), it is said by Mr. Chief Justice GRAVES:

“An estate upon condition is one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged, or destroyed. If set forth, the condition is express; and if it allows the estate to vest, and then to be defeated in consequence of nonobservance of the requirement, it is a condition subsequent”—citing authorities.

In *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215, the plaintiff had conveyed to the defendant's grantor—

“for the use and support of the first and all succeeding ministers, who shall be legally settled by a parish or religious society to preach in the meeting-house built by the corporation aforesaid, and all other meeting-houses which shall hereafter be built on the site where the meeting-house aforesaid stands.”

The deed contained also this clause:

“Provided always, and this grant is on this express condition, that the premises aforesaid shall forever henceforth be held by said corporation, or their assigns, for the use, benefit and support of the first and all succeeding ministers, who shall be settled by a parish or religious society, to preach in the meeting-house aforesaid, and all other meeting-houses which shall hereafter be built on the site where the meeting-house aforesaid stands, and for no other purpose whatever. And in default of the appropriation of the rents and profits thereof to that purpose, this deed shall be void, and the premises aforesaid shall be and remain in the grantors, and their heirs, as though this conveyance had never been executed.”

Construing this clause of the deed, the court there said:

“The terms used in this deed are those indicating, in the most direct and unequivocal manner, that the grantees were to take an estate upon condition subsequent.”

Fall Creek Township v. Shuman, 55 Ind. App. 232 (103 N. E. 677), was a case depending upon the conveyance of land “containing about one-fourth of an acre, so long as the same is used for school purposes.” The court thus treated the question:

“It is stated in Washburn on Real Property that the distinction between a condition subsequent and a conveyance with a limitation upon the title is technical, but clear. An example may be given by changing somewhat the language of the deed in controversy. If

the original grantor had stated in terms that the land was conveyed to the township to be used for school purposes, it would have been a condition subsequent, and, in order to divest the township of title, there must have been a re-entry of the original grantor or his heirs. But the language in this deed, 'so long as the same is used for school purposes,' divests the title *ipso facto* upon the happening of that event, and appellee in this case, holding the legal title by conveyances from his grantors, is entitled to recover."

In *Pepin County v. Prindle*, 61 Wis. 301 (21 N. W. 254), the deed of the land in question was given to the county by the defendant "upon the express condition and term that the said county of Pepin erect thereon within five years a courthouse for the use of said county and shall keep and maintain the same thereon for the space of ten years upon the express condition." This was held to be a condition subsequent. The foregoing are authorities cited by the plaintiff. He urges that the language of the deed makes the estate one upon conditional limitation operating to vest in the defendant something less than a fee-simple estate which automatically terminates at the time a certain thing happens. Most of the authorities which he cites, however, depend upon the particular language used passing the property until an event happens, or as long as a use is maintained, or some such language. Such precedents are these: *Board of Chosen Freeholders v. Buck*, 79 N. J. Eq. 472 (82 Atl. 418), where the grant was for the purpose of building thereon public offices to hold so long as thus used and no longer; *Universalist Society v. Boland*, 155 Mass. 171 (29 N. E. 524, 15 L. R. A. 231), where the conveyance was to have and to hold so long as devoted to certain tenets of religious faith, otherwise to cease and vest in certain individuals; *Aumiller v. Dash*, 51 Wash. 520 (99

Pac. 583), where the conveyance was for use as a road and way for irrigation while so used and no longer. There are cases, indeed, which hold that language similar to that employed in the case at bar amounts to a conditional limitation and not a condition subsequent; but the touchstone is found in the determination of whether the estate passed out of the grantor to be returned upon the happening of certain events or whether but part of the estate was separated from the owner. In the former instance the result is a condition subsequent, requiring some affirmative act of the grantor or those who represent him as heirs for the purpose of regaining the estate. In the latter, where less than the fee simple has gone from the grantor, it is denominated an estate upon conditional limitation, and contains within itself the elements of its own dissolution, so that it returns spontaneously to the grantor upon the happening of the event. Under a condition subsequent there remains in the grantor no estate whatever, but only a chose in action which is personal to himself and cannot be granted to another.

Section 7102, L. O. L., says:

“A deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale.”

Section 7103, L. O. L., states:

“The term ‘heirs,’ or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant.”

It is declared in the condition of the deed that "this conveyance is made and accepted on condition"; that is to say, the whole title of the grantor has passed from him and has been accepted by the grantee. Nothing is reserved. Under these sections of our Code already quoted, the language used operates to pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms or necessarily be implied by the terms of the grant. He, himself, used the words "the conveyance is made." It does not necessarily follow that, because a condition is appended, there passed less than all the estate which he had. The language of Mr. Chief Justice GRAVES in *Blanchard v. Detroit, Lansing & Lake Michigan R. R. Co.*, 31 Mich. 43 (18 Am. Rep. 142), is peculiarly applicable to the instant case:

"Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that although they deliberately make a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant."

So here it was competent for the grantor to employ either a condition or a limitation to effectuate his design. The granting clause, taken alone, operates to convey a fee-simple title. In the very words of the conveyance it passes "all our right, title and interest in and to the following described parcel of real estate." **I**ndeed, such must have been the contemplation of the

parties, for the instrument in question provides that "the title to said real estate shall revert to the grantors herein" upon condition broken. If it had not passed from them, it could not well revert to them. As part of the conveyance, however, the grantor appended what he denominated a condition, and we cannot impart to his words a different signification. He chose to annex a condition and not a limitation; hence, we must respect his choice and hold that the clause in question is a condition subsequent.

2. Conceding without deciding that the failure to maintain a county high school in the building which it had erected upon the premises, compelled though it was by the exercise of legislative authority, already mentioned, constituted a breach of the condition, it remains to consider the effect to be given to the deed from the plaintiff to the school district. As held in *School District No. 21 of Wallowa County v. Wallowa County*, 71 Or. 337 (142 Pac. 320), this instrument did not operate to convey anything to the grantee named because the grantor had then no estate which he could convey, especially as there had been no breach of the condition. On this point the rule is thus laid down in Section 207, Tiedeman, Real Property (3 ed.):

"Conditions are reserved only to the grantor and his heirs. They cannot be reserved for the benefit of third persons. As a general rule, therefore, only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights if they should convey away the reversion in them. The right of entry is not an estate, not even a possibility, of reverter; it is simply a chose in action."

Almost identical language is used in 1 Tiffany, *The Modern Law of Real Property*, Section 75 of which says:

"The right to take advantage of a condition subsequent belongs, at common law, exclusively to the grantor or lessor and his heirs, and he cannot reserve such right to others, even by express stipulation. Nor can the right to enforce a forfeiture, or, as it is usually called, the right of re-entry, be, at common law, assigned or transferred by the grantor to a third person before entry for the breach; this being in conformity with the common-law rule that 'nothing in action, entry, or re-entry can be granted over.' These restrictions as to the persons able to take advantage of a breach and the inability to assign the right have been generally recognized in this country, and not only will an attempted assignment of the right of re-entry be void, but it will have the effect of destroying the grantor's right to enforce the condition, which is thereafter in effect nonexistent."

We find this statement in 2 Reeves, Real Property, Section 721:

"An express condition (or condition in deed) cannot be validity reserved, at common law, to anyone except the grantor and his heirs; and neither it nor any right to enforce a forfeiture for its infraction can ordinarily be assigned, or even devised away, unless the authority so to deal with it has been created by statute. Being incident to a particular estate, as if, for example, an estate for years or life were granted away on condition by the owner of the fee, if the latter attempted to assign his reversion and the right to enter for a breach, the condition was thereby destroyed entirely, for the assignor could not enforce it because he had parted with it, and yet the assignee acquired nothing in it that he could enforce, because it was not assignable."

Substantially the same language is used in Section 954 of 2 Washburn, Real Property (6 ed.). Indeed, the text-writers are in unison on this point: *Berenbroick v. St. Luke's Hospital*, 23 App. Div. 339 (48

N. Y. Supp. 363); *Board of Education v. Baker*, 124 Tenn. 39 (134 S. W. 863); *Hooper v. Cummings*, 45 Me. 359; *Underhill v. Saratoga & Wash. R. R. Co.*, 20 Barb. (N. Y.) 455; *Tinkham v. Erie Ry. Co.*, 53 Barb. (N. Y.) 393; *Rice v. Boston etc. R. Co.*, 12 Allen (Mass.), 141; *Attorney General v. Merrimack Mfg. Co.*, 14 Gray (Mass.), 586.

3, 4. The effect of the deed from the plaintiff to the school district was a renunciation by the plaintiff of his potential future right to re-enter the land for condition broken. It was the same as though he had said to the school district:

"I do not care to enforce a possible forfeiture at any time. I wash my hands of the whole transaction; but, if you are able to recover the land, you have my permission."

As we have seen under the authorities, the plaintiff had nothing at the time which he could convey, because the estate had passed from him entirely, and there had been no breach of the condition upon which he could re-enter; and while in the aspect of affirmatively conveying an estate he accomplished nothing, yet as the waiver of the condition for once and all it has the effect to prevent his ever asserting a right of entry.

5. It is urged that only parties and privies are bound by an estoppel, but in this instance there is a privity of estate in the land which will give effect to the school district deed in favor of the defendant here as an obstacle to prevent the grantor from enforcing the condition subsequent which he has already waived. We do not find it necessary to consider whether the legislative action mentioned would operate to destroy the condition or whether the use by the county of the premises for the four years would satisfy the condition of

the deed, in the absence of any language therein compelling the defendant to maintain such a school there. As stated, the defendant expended \$25,000 of the public funds in establishing the county high school, and without its fault, but in obedience to the mandate of the people in their legislative capacity, it suspended its support of the school. These circumstances present a suitable case for the application of the rule of strict construction of a condition which would work out a forfeiture, and the courts should hesitate long and apply the law strictly where the result would be to take \$25,000 worth of property paid for by public funds and bestow it upon any individual for an alleged breach of condition. Something was said at the argument about what the plaintiff would do with the property if he regained the title as a result of this litigation; but we cannot give heed to such a statement. It is outside the record, and we must decide the case as it is laid in the pleadings. Moreover, as we have seen, he waived this right personal to himself and attempted to bestow it upon another. Failing to thus work out his purpose, he attempts to resume what he has laid down and to enforce a harsh forfeiture. Having once waived it, he can never take it up again.

The conclusion is that the judgment of the Circuit Court must be affirmed.

AFFIRMED. REHEARING DENIED.

Argued May 27, affirmed June 15, 1915.

IN RE SNEDDON.

(149 Pac. 527.)

Insane Persons—Guardianship—Adjudication of Sanity—Effect—Statute.

1. Section 3, page 680, Laws of 1913, provides that the county judge of any county, upon being notified in writing that any person, by reason of insanity, is unsafe to be at large, or is suffering from exposure or neglect, shall cause such person to be committed to a hospital for the insane upon a determination of his insanity by the county judge and a physician. Section 1319, L. O. L., provides that the several County Courts shall have power to appoint guardians for the estates of insane persons, idiots and all who are incapable of conducting their own affairs. Section 1342 defines an "insane person" as including every idiot, person not of sound mind, lunatic, and distracted person. Petitioner was committed to a hospital for the insane under Section 3, page 680, Laws of 1913. Guardians were appointed for his estate, and after his discharge from such hospital as improved he was recommitted thereto. From the recommittal order of the County Court he appealed to the Circuit Court, where an inquest before a jury resulted in his discharge as sane, and thereupon he petitioned for the removal of his guardians. *Held* that, since Section 1342, L. O. L., distinguishes between lunatics and persons of unsound mind, the mere fact that an incompetent has been released from an asylum to which he was committed as a lunatic, or unsafe to be at large, is no reason why he should be relieved of guardianship as a person of unsound mind incapable of conducting his own affairs, except upon express averment and adequate proof that he is able to conduct his own affairs, the absence of which from the petition and evidence in the instant case was fatal to the award of relief sought.

[As to adjudication of insanity as showing want of capacity to execute contracts, make wills, and the like, see note in 140 Am. St. Rep. 346.]

From Coos: JOHN S. COKE, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This was an application to the County Court of Coos County, Oregon, for the removal of guardians and to require them to account. The facts are that on July 14, 1913, the petitioner, Charles Sneddon, then about 72 years old, was adjudged by that court to be of un-

sound mind, and thereupon he was incarcerated in the state hospital for the insane. Ellen Sneddon, his wife, John B. Sneddon, a son, and Hannah Rees, a daughter, were appointed by that court guardians of his estate and qualified for the trust. The petitioner was soon released from the asylum "as improved," but was again apprehended, charged with insanity, and such proceedings were had that on December 30, 1913, he was by that court ordered to be recommitted. From such order he appealed to the Circuit Court of the State of Oregon for that county, where, a jury having been called, the inquest resulted in his discharge. Thereupon he made the application first hereinbefore mentioned, and based on authenticated records of the verdict of the jury and the decree rendered in accordance therewith, the County Court granted the prayer of the petition. An appeal from such order was taken by the guardians to the Circuit Court, where, at the hearing of the cause, findings of fact and of law were made, and, predicated thereon, the determination of the County Court was reversed. From the latter decree the petitioner appeals to this court. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Dwight E. Hodge* and *Mr. Wm. T. Stoll*, with an oral argument by *Mr. Hodge*.

For respondent there was a brief over the names of *Mr. Harry. G. Hoy* and *Mr. I. N. Miller*, with an oral argument by *Mr. Hoy*.

Opinion by MR. CHIEF JUSTICE MOORE.

Section 3 of Chapter 342, Laws Or. 1913, reads:

"The county judge of any county in this state, upon being notified in writing that any person by reason of

insanity is unsafe to be at large or is suffering from exposure or neglect, shall cause such person to be brought before him at such time and place as he may direct, and shall also cause to appear one or more competent physicians who shall proceed to examine the said person as to his mental condition. Should the said examining physician find, and certify under oath, that said person is insane, and the said county judge be of the same opinion, he shall order such insane persons committed to the proper state hospital for the insane."

In conformity with this clause of the act, Charles Sneddon was duly adjudged insane and incarcerated in the asylum. The statute referred to does not contain any provision for the appointment of a guardian for an insane person.

"The several County Courts, in their respective counties in this state, shall have power to appoint guardians to take care, custody, and management of the estates, real and personal, of all insane persons, idiots, and all who are incapable of conducting their own affairs, and the maintenance of their families, and the education of their children": Section 1319, L. O. L.

Another clause of the Code, as far as deemed material herein, reads:

"The words 'insane person' are intended to include every idiot, every person not of sound mind, every lunatic, and distracted person": Section 1342, L. O. L.

The application to the County Court for the aid sought was supplemented by the joint affidavit of the petitioner and his son Hugh Sneddon. Their sworn statement in writing is to the effect that since the appointment of the guardians Charles Sneddon had been discharged from the hospital for the insane "as improved"; that after his return to Coos County he was again charged with lunacy, and upon an inquest

before the County Court he was found to be insane and ordered to be recommitted; that from such order he took an appeal to the Circuit Court, and at the hearing of the cause the jury found him to be sane, whereupon he was discharged. The motion referred to is addressed to the guardians, and contains a statement as follows:

“This application will be heard and based upon the files and records in this case, also an affidavit by said Charles Sneddon and Hugh Sneddon, a copy of which is hereby served upon you, the original of which is on file in this court.”

The transcript before us shows that, pursuant to the notice so served, Walter Sneddon, a son of the petitioner, filed in the County Court, on March 12, 1914, an affidavit to the effect that for more than ten years prior thereto he had been living in the State of Washington; that he secured his father's release from the asylum, taking him to Portland, and accompanying him in that city to a steamer which he boarded for Marshfield, Oregon. Referring to this parent at that time the witness deposed:

“He was clearly suffering from delusions of persecution, and was bent upon employing attorneys and involving himself and his estate in expensive litigation without any sane policy in said matters; that he was possessed with the idea that certain persons were trying to steal his real property or to rob and defraud him out of the same.”

The affiant further states that upon visiting his home February 26, 1914, he had on several occasions conversed with his father, who was not competent to transact his own business, but was a proper subject for guardianship of his person and estate. Alluding

to the condition of the petitioner when the affidavit was made, the affiant further says:

“He is in no way improved at this time, so far as I can observe.”

The joint affidavit of Ellen Sneddon, the wife of the petitioner, Charles Sneddon, Jr., Jennie Bedford, Hannah Rees, John B. Sneddon and William Sneddon, filed in the County Court March 12, 1914, is practically to the same effect as the sworn written statement of Walter Sneddon. From this affidavit of Mrs. Sneddon and others, who constitute the entire family, except the petitioner, Hugh Sneddon, and his brother, Walter, excerpts will be taken, to wit:

“That we are each and all familiar with the mental condition of the said Charles Sneddon as indicated by his acts and conduct; that it appears from his said acts and conduct that he is incapable of conducting his own affairs; that the said Charles Sneddon is, and for more than two years last past has been, the subject of fixed delusions of persecution; that he is strongly of the opinion that certain of the prominent citizens of Coos County, Oregon, are seeking to defraud him and his wife, the said Ellen Sneddon, and each of them, out of their property; * * that he has repeatedly sought to have different persons arrested and indicted for alleged attempts to steal his property and the property of his wife, the said Ellen Sneddon; that he has made several trips to Portland and other points to confer with the departments of justice and surveying of the United States located at those points, for the purpose of securing indictments and procuring alleged evidence as to surveys and to visit and appeal to the Governor of the state for aid in his imaginary difficulties over title to real property in Coos County; that, if permitted to go at large without a guardian or guardians, the said Charles Sneddon will dissipate his estate and come to want, and will continue to keep the members of his family in a state of anxiety and un-

certainty over his whereabouts and personal welfare; that his present condition has been growing on him for some years, and is, so we are informed and believe, a condition that cannot be the subject of improvement, owing to his advanced years and the peculiar nature of his mental disorders."

A written stipulation made March 12, 1914, was signed by counsel for the petitioner and the attorneys for the guardians, and is to the effect that, if certain named physicians who have charge of and are employed in the hospital for the insane at Salem, Oregon, were present, each would testify as set forth in a letter written by him in relation to the mental condition of Charles Sneddon, which letters are made a part of the agreement. No objection was made by the petitioner's counsel to the form of proof offered, but only that the letters were incompetent, irrelevant and immaterial. As the communications referred to tend to substantiate the same state of the patient's mind, only the letter of Dr. Steiner, the superintendent in charge of the asylum at Salem, Oregon, a physician of great learning and large experience in the treatment of mental diseases, will be set forth. This letter was written to the petitioner's counsel, and is as follows:

"Wm. T. Stoll, Atty. at Law, Marshfield, Oregon—

"Dear Sir: In reply to your letter of February 20, will say that we could not intelligently give an opinion as to the capacity of Chas. Sneddon, since he left this hospital. Will say to you however, at the time he left here we felt as though he was sufficiently recovered that he could be cared for at home with but little trouble, and as a matter of fact did not belong in a place of this kind as his insanity was not considered in any way of a dangerous character. When he came here he harbored delusions of persecution and retained them when he left. He was unreasonable in many of his views, but on the whole was a kindly disposed

gentleman, and we thought well of him. As to his present condition, I know nothing and have no interest in it whatsoever, as he is discharged from this place and not within our care.

"Allow us to quote an excerpt from the patient's history which is a permanent record at this institution, dated August 4, 1912: 'Has delusions of persecution, believing his neighbors and various people are plotting against him; his ideas are very much fixed; he is headstrong, and he believes that he has been trapped into the institution and demands his release immediately; his mental state is due to senility,' Other excerpts are as follows: October 18, 1912: 'Mental condition somewhat childlike, emotional and simple. Diagnosis of his mental state is senility with possible delusions, paranoidal in type.' October 20, 1913, written by an attendant upon whose ward he was confined: 'He is getting quite childlike.' October 13, 1913: 'Patient is quite tidy, has a good appetite, and sleeps quite well. He suffers from delusions of persecution.'

"Naturally the patient in consideration is very earnest in his views, and would make a good impression upon men not versed in the examination of one's mental state. They would not know how to begin the examination, nor how to conduct one in a way necessary to bring out the defects present, and unless the patient has active delusions of persecution at the time of the mental examination, and was apparently disturbed in mind, one could easily see how a well-meaning jury composed of laymen could misinterpret the actual findings of such a case and render a verdict of the patient being sane.

"It is a notorious fact that after a patient has been confined in an institution of this sort and learns what his ideas are that are looked upon as being delusions, futuarely he is shrewd enough to keep those ideas closely guarded, and it is with much difficulty and continued observation of such cases that the real facts are learned.

Yours truly,

"R. E. LEE STEINER,

"Superintendent."

In considering these matters an order was made March 14, 1914, by the County Court which states that:

"The court, after hearing the arguments of counsel and examining the records and files in the cause, also examining the verdict of the jury in the Circuit Court, * * in which verdict it was found that said Charles Sneddon was sane, finds that from the verdict of said jury that said Charles Sneddon was adjudged by the Circuit Court * * to be sane, and that he is capable of attending to his own affairs, and that the order heretofore made appointing John B. Sneddon, Ellen Sneddon, and Hannah Rees guardians be and the same is hereby revoked and held for naught, and said guardians be required to settle with the said Charles Sneddon or file an account in this court of their accounts as such guardians, and after said account has been approved, and they have filed receipts for all sums of money received by them, that the said guardians be discharged."

On appeal from that order the Circuit Court, after hearing the cause, made findings of fact as follows:

(1) "That the County Court based its order discharging the guardians solely upon the judgment in the above-entitled court in a certain case wherein the above-named Charles Sneddon was tried in a proceeding under Chapter 342, General Laws of 1913, whereby it was sought to have him committed to the state hospital for the insane, by which judgment he was found 'sane,' there being no other evidence offered in the County Court upon which the said order appealed from could have been made."

The second finding of fact is in the nature of a conclusion of law. It compares Chapter 342, Gen. Laws Or. 1913, with Sections 1319 and 1342, L. O. L., hereinbefore quoted, and states that those provisions are separate, and that the phrase "insane persons," as used in the act of 1913, is entirely distinct from the

meaning of such words as defined and employed in the other sections of the Code. Based on such findings, conclusions of law were deduced as follows:

"(1) That the County Court erred in making the order discharging the guardians of the said Charles Sneddon, and the order appealed from should be reversed; (2) that the application of the said Charles Sneddon to have his guardians discharged should be denied."

It will be remembered that Section 1319, L. O. L., empowers the County Court of any county to appoint guardians to take care, custody and management of the estates of all insane persons, "and all who are incapable of conducting their own affairs." The petition of Mrs. Sneddon and four of her children, filed in the County Court of Coos County, Oregon, August 19, 1913, for the appointment of guardians, and pursuant to which the order prayed for was granted, states that Charles Sneddon had been adjudged insane and was then confined in the state asylum, and that he "is totally incapable of transacting his ordinary business," thereby disclosing that the application reasonably conforms to the requirement of the statute. Neither in the motion filed in that court to have the guardians discharged after the jury had determined Charles Sneddon to be sane nor in the joint supplemental affidavit made by him and his son Hugh is it stated that the petitioner is capable of conducting his own affairs.

It will be kept in mind that Section 1342, L. O. L., defines an "insane person" to include every person not of sound mind, every lunatic, and distracted person. Section 3 of Chapter 342, Gen. Laws Or. 1913, authorizes a County Court, when notified in writing that any person, by reason of insanity, "is unsafe to be at large or is suffering from exposure or neglect,"

to cause an inquest to be held to determine the matter. Construing these statutes together, it will be seen that degrees of mental weakness are recognized, and it is only when it satisfactorily appears to the County Court that a person charged with insanity is unsafe to be at large or is suffering from exposure or neglect that a commitment to the hospital for the insane is authorized. After Charles Sneddon was released from custody and again apprehended, the County Court, in order to acquire jurisdiction of the cause, must have been notified in writing that by reason of his insanity he was either unsafe to be at large or was suffering from exposure or neglect. When it was determined that he should be recommitted to the asylum, the County Court must necessarily have found the averments of the petition to be true. Upon appeal from that order when the jury at an inquest found he was sane, the Circuit Court, sitting as a chancellor, accepted the advice thus sought, and thereupon discharged the petitioner. When a person charged with lunacy is adjudged to be sane and discharged, it might ordinarily be presumed that such determination conclusively establishes the fact that he is not afflicted with mental weakness or exaltation in any degree, and, since it is not usually essential to allege any fact which the law will presume, it was not necessary to aver in the petition for a discharge of the guardians that the ward was capable of conducting his own affairs. As Section 1342, L. O. L., makes a distinction between lunatics and persons of unsound mind, the latter class should not be relieved of guardianship, when regularly appointed, except upon an express averment and adequate proof that they are capable of conducting their own affairs. No averment to that effect having been made nor proof offered in relation thereto on behalf

of the petitioner, but evidence to the contrary having been submitted by the guardians, the petition did not state facts sufficient to entitle an award of the relief granted, and too much importance was attached by the County Court to the verdict and decree of the Circuit Court.

It follows that the decree which has been brought up for review should be affirmed; and it is so ordered.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

Argued January 28, writ allowed February 9, rehearing denied March 9, execution ordered to issue June 15, 1915.

STATE EX REL. v. HODGIN.*

(146 Pac. 86; 149 Pac. 530.)

Officers—Tenure—Declared Vacancy.

1. Under Section 1, Article XV, of the Constitution, providing that all officers except members of the legislative assembly shall hold their offices until their successors are elected and qualified, the legislature has no power to declare a vacancy in an office held by virtue of an election.

[As to when appointment to office is complete, see note in Ann. Cas. 1914D, 304.]

District and Prosecuting Attorneys—Tenure—Declared Vacancy.

2. Under Laws of 1913, page 686, providing that there shall be a district attorney for every county, that each district attorney then in office shall become a district attorney for the county in which he resides, and that, where the term of such district attorney expires prior to 1916, there shall be a vacancy which shall be filled by appointment, a district attorney previously elected holds his office by election and not by legislative appointment, and the provision of the act declaring a vacancy before his successor is elected and qualified is invalid.

*The authorities passing upon the purpose and effect of provision that incumbent shall hold his office until his successor is elected and qualified are reviewed in a note in 50 L. E. A. (N. S.) 365.

REPORTER.

Quo Warranto—Original Proceedings—Notice.

3. The requirement of Supreme Court Rule 33 that preliminary notice of an original proceeding in *quo warranto* shall be served on the adverse party is waived by respondent's answer to the merits.

Quo Warranto—Costs—Allowance.

4. Section 2, Article VII, of the Constitution, declaring that the Supreme Court may in its discretion take original jurisdiction in *mandamus* and *quo warranto*, etc., makes Section 562, L. O. L., providing for the allowance of costs to a successful plaintiff; applicable to an original proceeding in *quo warranto*.

Quo Warranto—Costs—Objections—Waiver.

5. Under Section 569, L. O. L., declaring that the losing party must in five days urge his objections to allowance of costs, a defendant in *quo warranto* brought in the Supreme Court must urge his objections to the allowance of costs within that time or they are lost.

Quo Warranto—Costs—Allowance—Enforcement.

6. Section 213, L. O. L., declares that a party in whose favor judgment is given which requires the payment of money may have a writ of execution issued for its enforcement. Section 215 declares that the writ shall be issued by the clerk and directed to the sheriff, while Section 216 declares that it may be issued to the sheriff of any county. Section 983 declares that, when jurisdiction is by organic law conferred on any court or judicial officer, all means to carry it into effect are also given. *Held* that, where the Supreme Court had original jurisdiction of a *quo warranto* proceeding, the Code provisions authorizing the issuance of execution warranted the issuance of execution to recover costs.

Original proceedings in Supreme Court.**In Banc. Statement by MR. JUSTICE BENSON.**

This is an original application for *quo warranto* by the State of Oregon, on the relation of F. S. Ivanhoe against John S. Hodgin.

The legislature, at its regular session in 1913, passed an act providing for a district attorney for each county in the state, who should hold office for a term of four years, and until his successor is elected and qualified. The act further provides as follows:

“Each of the district attorneys in office when this act goes into effect shall then become and be the district attorney for that county of his district of which he is then a resident, and shall hold such latter office until the ex-

piration of the term for which he was elected, and until his successor is appointed or elected and qualified."

Section 5 of the same act provides as follows:

"That as soon as this act goes into effect and becomes a law the Governor shall appoint suitable and qualified persons respectively residents of each of such counties in this state in which there is no district attorney resident thereof to serve as district attorney of such county, to hold office until the general election in 1916, or until his successor is elected and qualified, and whenever the term of any district attorney for which he was elected shall expire before the said general election in 1916, such office shall then be vacant and the Governor shall thereupon appoint a suitable and qualified person to fill such vacancy and to hold such office until the said general election in 1916, and until his successor is elected and qualified."

On November 8, 1910, F. S. Ivanhoe, who was then, and at all the times herein mentioned has been, and now is, a resident of Union County, was elected district attorney for the judicial district composed of the counties of Union and Wallowa, to serve for a term of four years, beginning on the first Monday in January, 1911, and thereafter qualified as such officer and immediately assumed the duties of the office. Ivanhoe continued to act as district attorney for Union County until January 6, 1915, at which time John S. Hodgin, having been appointed to the position by the Governor, pursuant to the act of 1913, assumed the duties of the office. The relator, Ivanhoe, then brings this proceeding in the nature of *quo warranto* in this court, to determine who is the rightful incumbent of the office.

WRIT ALLOWED. REHEARING DENIED.

For the State there was a brief with oral arguments by *Mr. Robert S. Eakin* and *Mr. Thomas H. Crawford*.

For defendant there was a brief with oral arguments by *Mr. James D. Slater* and *Mr. John S. Hodgin*.

MR. JUSTICE BENSON delivered the opinion of the court.

Plaintiff contends that, after the act of 1913 became effective, he still held the office of district attorney for Union County by virtue of his election in 1910, and that Section 1 of Article XV of the Constitution of Oregon prevents the legislature from declaring a vacancy which may be filled by appointment. This section reads:

"All officers, except members of the legislative assembly, shall hold their offices until their successors are elected and qualified."

Defendant contends that the act of 1913, providing for a district attorney for each county, "abolished every then existing judicial district in the state and created new ones, of one county each, so far as the election of district attorneys is concerned." Defendant also contends that, after the act of 1913 became effective, plaintiff held the office, not by virtue of his election in 1910, but by virtue of a legislative appointment.

1. The case has been presented both in the briefs and the oral argument, from various points of view; but we are of opinion that the sole question for determination is this: Did plaintiff, after the act of 1913 became effective, hold the office by virtue of his election in 1910, or did he hold by virtue of a legislative appointment? If he held by virtue of the election, the constitutional provision (Article XV, Section 1), controls, and the legislature had no power to declare a vacancy. In the case of *Stocking v. State*, 7 Ind. 326, Mr. Justice STUART says:

"We lay no stress on the declaration of the legislature that there was a vacancy in the office of circuit judge of the new circuit. If there was a vacancy, it existed independent of that declaration. If there was no vacancy, that body could not create one by a declaratory enactment."

This language was quoted with approval by Mr. Justice LORD of this court, in the case of *Cline v. Greenwood*, 10 Or. 238, and this view is sustained by the language of Article XV, Section 1, of the Constitution, *supra*.

2. We come, then, to the act of 1913 relating to the office of district attorney, and, after a careful consideration of its several provisions, we are convinced that the legislature never intended to abrogate the office tenure of the district attorneys in office at the time when the act became effective, but merely to reduce the area of each one's district to the county of which he was then a resident. The plaintiff held his office, then, not by virtue of a legislative appointment, but because he had been elected thereto, and since no election of a successor was had in Union County, in November, 1914, there was no vacancy in January, 1915, which the Governor was authorized to fill.

It follows that the judgment must be entered for plaintiff. **WRIT ALLOWED. REHEARING DENIED.**

Order for execution to issue June 15, 1915.

ON PRÆCIPUE FOR EXECUTION.

(149 Pac. 530.)

In Banc. Statement by MR. JUSTICE BURNETT.

This was an action at law in the nature of *quo warranto*, commenced in this court, in which a judgment of

ouster was rendered February 9, 1915, excluding the defendant from the office of district attorney for Union County, and charging him with the costs and disbursements of the action, taxed at \$60. The plaintiff has filed a praecipe for execution to the sheriff of that county on the money judgment. By direction of the court the parties filed briefs for and against the motion, which have had our consideration.

EXECUTION TO ISSUE.

For the plaintiff there was a brief over the name of *Messrs. Crawford & Eakin*.

For defendant there was a brief submitted by *Mr. John S. Hodgin*.

MR. JUSTICE BURNETT delivered the opinion of the court.

3. The defendant charges that, because no preliminary notice thereof was given, the proceeding was violated *ab initio* of Rule 33 of this court, reading thus:

"No writ of *habeas corpus*, or other writ of original jurisdiction will issue from this court when the applicant has a full, speedy, and adequate remedy in the Circuit Court, except by permission of the court, or a justice thereof, on notice to the adverse party."

In our judgment this objection was waived by the defendant's answering to the merits of the action. In respect to his complaint that the matter could have been heard at his home in Union County before the Circuit Court there, we cannot now indulge in balancing the relative convenience of an initial hearing in the Circuit Court, plus a very probable appeal, as against an original proceeding in the first instance in this court.

4. Article VII, Section 2, of the Constitution of this state, in its amended form, declares:

“The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the Supreme Court may, in its own discretion, take original jurisdiction in *mandamus*, *quo warranto* and *habeas corpus* proceedings.”

It is by virtue of the last clause of this section that this court entertained the prosecution of this action as an original proceeding here. The meaning and effect of that constitutional precept is to ingraft upon the authority of this court the procedure in such cases as defined in the Code to be exercised here in like manner as in the Circuit Court: *Phy v. Wright*, 75 Or. 428 (147 Pac. 381). One of the incidents accompanying cases of this kind is the matter of costs as defined in Section 562, L. O. L., where it is said that such charges are allowed, of course, to the plaintiff upon a judgment in his favor in an action provided for in Chapters 4 and 5 of Title V of the Code, which include the very kind of action here under consideration. All the features of the original procedure as defined in the Code passed to this court with the constitutional grant of power to which reference has been made. We conclude that we had authority to render judgment for costs and disbursements in favor of the prevailing party.

5. Some question is made for the first time as to the amount of the items, but the opportunity to urge such opposition is past, because Section 569, L. O. L., says that the losing party must file his objections within five days from the expiration of the time allowed to file the original statement of costs and disbursements. The period thus limited has long since elapsed.

6. Having shown our authority to render the judgment we pass to the consideration of the means of enforcing it. The following provisions of the Code apply here:

Section 213, L. O. L.:

“The party in whose favor a judgment is given, which requires the payment of money, the delivery of real or personal property, or either of them, may at any time after the entry thereof have a writ of execution issued for its enforcement, as provided in this chapter.”

Section 215, L. O. L.:

“The writ of execution shall be issued by the clerk and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment, and if it be for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows: (1) * * Otherwise, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of the real property belonging to him. * * ”

In Section 216, L. O. L., it is said:

“When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in this state.”

It will be observed that the right to issue execution is not confined to any particular judicial tribunal. The plain deduction is that any court having authority to render judgment is necessarily vested with power to enforce its decision. Moreover, it is said in Section 983, L. O. L.:

“When jurisdiction is, by the organic law of this state, or by this Code, or any other statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the

jurisdiction, if the course of proceeding be not specifically pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

This fortifies and more particularly enunciates the principle that the right to enforce its decree is inherent in any court of original jurisdiction. Such power having been vested in this court as to the proceeding named, the authority to enforce the same is necessarily included. The means adapted to that end are pointed out in the Code, and it is not only within the spirit, but also within the letter, of the statute to hold that execution directed to the sheriff of any county in the state is an appropriate exercise of the prerogative of this court in a case of original jurisdiction.

Let the execution issue to the sheriff of Union County, as requested in the praecipe.

EXECUTION TO ISSUE.

Motion to dismiss appeal filed May 4, allowed June 15, 1915.

GRAF v. PEARCY.

(149 Pac. 532.)

Appeal and Error—Transcript—Jurisdiction.

1. An appellant was not entitled to file a transcript or abstract until the expiration of the time to except to the sureties on the undertaking, so that the filing of the transcript before the expiration of such time was premature, and gave the Supreme Court no jurisdiction.

Appeal and Error—Undertaking—Substitution.

2. Under Section 268, L. O. L., allowing defendant ten days to give the plaintiff notice of the justification of bail, and that in case other bail is given there shall be a new undertaking in the form and to the effect prescribed in Section 262, if the first undertaking is insufficient, the appellant must first get leave of court to file a new undertaking.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

This is an action by Anna Graf against J. N. Percy and C. H. Jacobs. From a judgment in favor of plaintiff, the defendant, J. N. Percy, appeals. Plaintiff and respondent files motion to dismiss the appeal.

MOTION ALLOWED.

Mr. Arthur Langguth and Mr. H. L. Lyons, for the motion.

Mr. Ed. Mendenhall and Mr. W. F. Magill, contra.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. This is a motion by the respondent to dismiss the appeal. The judgment was rendered on December 9, 1914, and defendant Percy filed a notice of appeal February 16, 1915, and an undertaking on appeal the same day. On the 19th of February, 1915, the respondent filed exceptions to the sureties on the undertaking on appeal. The appellant failed to produce said sureties for the purpose of justification within the time allowed by law, and on February 25, 1915, filed a new undertaking with a different surety without notice to the respondent or leave of the court first obtained. The appellant filed a transcript in this court on the 18th of March, 1915, and thereafter asked leave of this court to file said second undertaking. He was not entitled to file a transcript or abstract until the expiration of the time to except to sureties on the undertaking had expired. Therefore, when the transcript was filed in this case, the same was premature, and gave this court no jurisdiction: See *Cook v. City of Albina*, 20 Or. 190 (25 Pac. 386).

2. A party is not entitled to substitute a new undertaking with different sureties under Section 268 of the Code. If the first undertaking is insufficient for any reason the appellant must first get leave of court to file a new undertaking: *Simison v. Simison*, 9 Or. 333, approved in *Chambers v. Everding & Farrell*, 71 Or. 521, 525 (136 Pac. 885, 143 Pac. 616).

The motion to dismiss is allowed.

MOTION ALLOWED.

MR. JUSTICE BEAN delivered the following dissenting opinion.

The present case differs from that of *Cook v. City of Albina*, 20 Or. 190 (25 Pac. 386). In the latter the appellant was given an opportunity in this court to perfect his appeal, which he failed to do. For that reason, coupled with the fact that the transcript was prematurely filed, the cause was dismissed. According to the majority opinion, the transcript on appeal in the case at bar was in the hands of the clerk at the time for filing the same, and I see no good reason for denying a hearing on that ground alone.

Section 550, subdivision 4, L. O. L., provides in part:

“When a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just.”

This statute furnishes an ample remedy if the attempt to file an undertaking herein is ignored.

Argued June 1, affirmed June 15, 1915.

ROWE v. ROWE.*

(149 Pac. 533.)

Divorce—Support of Children—Enforcement—Foreign Judgment—Finality.

1. Under Section 138, Civil Code of California, providing that the court may, pending an action for divorce, or at the final hearing, or at any time thereafter during the minority of any children, make such orders for their custody and maintenance as may be necessary or proper, and may at any time modify or vacate the same, and Section 139, providing that where a divorce is granted for an offense of the husband the court may compel him to make suitable allowance for the wife's support, and may modify its orders, a decree of the California Superior Court that defendant pay to his divorced wife \$20 per month for the support of their child during its minority and until otherwise ordered, was not a final decree, since it was subject to vacation at any time, so that the Circuit Court in Oregon had no jurisdiction to render a decree enforcing it.

[As to divorce granted in another state, see notes in 7 Am. Dec. 206; 26 Am. Rep. 31.]

Divorce—Alimony—Foreign Decree—Enforcement.

2. In a wife's action for divorce brought in California, a finding or conclusion that she was entitled to \$10 per month to be paid by defendant, without any decree following such conclusion, was not a final decree upon which execution might issue, nor one on which suit could be brought in another state.

From Lane: LAWRENCE T. HARRIS, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit by Nathan Rowe against Agnes Jessie Rowe and James C. Parker, as sheriff of Lane County, Oregon. The facts are in the year 1900, the defendant in the present suit obtained a decree of divorce from this plaintiff, which awarded her the custody of the minor child of the parties, and contained, among other matters, the following:

*As to action to recover installments of alimony accruing under a decree rendered in another state, see notes in 59 L. R. A. 178; 9 L. R. A. (N. S.) 1168; 28 L. R. A. (N. S.) 1068. REPORTER.

"That all of the allegations of the first count and cause of action set up by plaintiff in her said first amended complaint herein are true and have been proven to the satisfaction of the court by said evidence. And, as conclusions of law, that plaintiff is entitled to a decree of this court forever dissolving the bonds of matrimony heretofore existing and yet undissolved between the plaintiff and the said defendant, and awarding to her the care, custody and control of the minor child, issue of their marriage, Ethel Pearl Rowe, and the sum of \$10 per month to be paid to her, said plaintiff, by defendant monthly, beginning with the month of October, 1900. Wherefore, be it, and it is hereby ordered, adjudged, and decreed that the bonds of matrimony existing between plaintiff Agnes Jessie Rowe and defendant Nathan Andrew Rowe be and the same are hereby forever dissolved, and that the said parties be and each of them are hereby forever freed from all the obligations thereof. That all the property in the possession, under the control or in the name of plaintiff, is and shall be and remain her separate property and estate. And it is further ordered, adjudged and decreed that the care, custody, and control of said minor child, Ethel Pearl Rowe, be and it is hereby awarded and granted to plaintiff. And it is also further ordered and decreed and adjudged that defendant pay unto plaintiff the sum of \$20 per month each and every month hereafter, during the minority of said child and until and unless otherwise ordered by the court, for the care, support and maintenance of the said Ethel Pearl Rowe, and that plaintiff have judgment against defendant for said monthly sum to be paid as aforesaid. Let judgment be entered accordingly."

The plaintiff here (defendant in the divorce proceeding) removed to Oregon, and in 1905 his former wife brought a suit in the Circuit Court of Lane County to enforce the California decree. Defendant (plaintiff here) appeared and demurred to the complaint in that suit, but failed to plead further. Where-

upon the court entered a decree requiring him to pay to the plaintiff in that proceeding the sum of \$749.33 as alimony and accrued interest thereon, and the further sum of \$1,499.66 for the maintenance of the minor child; being the aggregate of the sums prescribed by the California decree and accrued interest thereon. It further decreed that he should continue in the future to pay monthly the sums decreed by the California court as alimony and maintenance until the Superior Court, which had granted the original decree, should vacate or modify the same.

Plaintiff brought this suit to set aside the decree of the Circuit Court of Lane County upon four grounds: (1) That the California decree was not a final decree and no decision of the Superior Court of California had been made determining the amount due, and that the Oregon court had no jurisdiction of the subject matter under the suit started by defendant in 1905, in which the decree sought to be enjoined was rendered; (2) that the decree for alimony in the California decree was obtained by fraud, for the reason that no alimony was asked for in the complaint upon which said decree was rendered; (3) that the California court had no jurisdiction to render the decree for alimony on the ground that the amended complaint upon which the same was based did not ask for alimony; (4) that after the rendition of the decree in this state the plaintiff, upon his own application, was duly adjudged a bankrupt in the United States District Court of the District of Oregon, and had duly received his discharge in bankruptcy. In her answer defendant admits the rendition of the decree in California, the rendition of the decree in Oregon, and denies all other allegations set forth in the complaint as to each of the causes of suit except the fourth. She further

alleges the various amounts recovered in the Oregon decree, and admits the issuance of an execution to collect the same. The Circuit Court in the findings of fact and conclusions of law found that the decree of California was not a final decree, and that the court of this state had no jurisdiction to render a decree thereon in this state, and set aside the decree of 1906 and all proceedings had thereunder. Defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Williams & Bean*, with an oral argument by *Mr. John M. Williams*.

For respondent there was a brief and an oral argument by *Mr. Fred E. Smith*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The decree of the California court as to the sums to be paid for the maintenance and support of the minor was not a final decree under the statutes of that state. Those sections of the Civil Code bearing upon this subject are as follows:

"Sec. 138. Orders Respecting Custody of Children. In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same.

"Sec. 139. Support of Wife and Children on Divorce or Separation Granted to Wife. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suit-

able allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

1, 2. From the above it will be seen that the California law reserves to the court entering a decree for the maintenance of a minor full power to vacate such order at any time, and the better authorities hold that such a decree is not within the "full faith and credit" clause of the national Constitution: *Sistare v. Sistare*, 218 U. S. 1 (54 L. Ed. 905, 20 Ann. Cas. 1061, 28 L. R. A. (N. S.) 1068, 30 Sup. Ct. Rep. 682); *Bleuer v. Bleuer*, 27 Okl. 25 (110 Pac. 736); *Mayer v. Mayer*, 154 Mich. 386 (117 N. W. 890, 129 Am. St. Rep. 477, 19 L. R. A. (N. S.) 245). In *Sistare v. Sistare*, Mr. Chief Justice WHITE sums up the authorities as follows:

"First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber Case*, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where by the law of the state in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due."

Here, so far as the allowance for the benefit of the child is concerned, the order is subject to vacation at any time, and under the rule stated is not final. So far as the amount claimed by the wife is involved, there is a finding of the court, or rather a conclusion of law, that she is entitled to a decree of divorce, the custody of the minor child, and the sum of \$10 per month to be paid to her by the defendant. In this particular the decree itself does not follow the conclusion, but adjudges that plaintiff in that suit have a divorce from defendant; that all property in her name remain her separate property; that she have the custody of the minor child; that defendant pay her \$20 per month for the support of the child during its minority unless otherwise ordered; and that plaintiff have judgment for such monthly sum. It will thus be seen that plaintiff has not now, and never has had, a decree or judgment for the \$10 per month alimony claimed by her, but only a finding or conclusion that she ought to have it. This is not such a judgment or decree upon which execution could have been issued either here or in California: 23 Cyc. 666; *Broder v. Conklin*, 98 Cal. 360 (33 Pac. 211). The decree of the California court was made a part of the complaint in the suit brought by defendant against her husband, and it therefore fully appeared that there was no final decree either for the payment of alimony or for maintenance of the child; and the Circuit Court of Lane County was without jurisdiction to render a decree enforcing the California decree. These considerations render it unnecessary to discuss other interesting propositions raised in the able brief of appellant.

The decree of the Circuit Court will therefore have to be affirmed; but, while we find ourselves unable by

reason of the law to compel plaintiff in this proceeding to support his minor child, his conduct in refusing to do so is morally so repugnant to our sense of what decency requires of him under the circumstances that we will not require defendant to pay the costs of this appeal.

The decree of the Circuit Court is affirmed, without costs to defendant in this court. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BEAN concur.

MR. JUSTICE BENSON taking no part in this decision.

Argued on motion to dismiss September 11, motion overruled September 23, 1913.

Appeal dismissed as per stipulation June 21, 1915.

WALLING v. LA FOLLETTE.*

(134 Pac. 1192.)

Appeal and Error—Time for Appeal—Statutory Provisions.

1. Where a judgment was rendered on January 10, 1913, and the time for taking the appeal under the law then in force would expire on June 10th of that year, the time was extended by Session Laws of 1913, page 617, which went into effect June 3d, and which provided that, where the right to appeal existed at the time the act went into effect, the time should be extended for 60 days thereafter.

Time—Time for Appeal—Computation—Exclusion of First or Last Day.

2. In computing the time of such extension, the day on which the act went into effect should be excluded and the last day should be included so that the time would expire on August 2d at midnight.

[As to computation of time, see notes in 7 Am. Dec. 250, 46 Am. Rep. 410; 78 Am. St. Rep. 872.]

From Marion: PERCY R. KELLY, Judge.

This is an action by Lillian Walling, whose name is now Lillian Walling Williams, against A. M. La Fol-

*This appeal dismissed on stipulation June 21, 1915. **REPORTER.**

lette and Mrs. A. M. La Follette. From a judgment in favor of plaintiff, defendants appeal. Respondent files motion to dismiss the appeal.

MOTION OVERRULED.

Mr. Woodson T. Slater and Mr. Myron E. Pogue,
for the motion.

Mr. John H. McNary, Messrs. Carson & Brown and
Messrs. Smith & Shields, contra.

Department 2. Opinion by MR. CHIEF JUSTICE MOBRIDE.

This is a motion to dismiss the appeal. Judgment was entered in the Circuit Court on January 10, 1913, under the law as it existed prior to the amendment contained in Chapter 319, Session Laws of 1913. The time for appeal would have expired July 10th of that year. Section 550 of said amendatory act is as follows: "An appeal shall be taken and perfected in a manner prescribed in this section and not otherwise: (1) A party to a judgment, decree or final order or any order from which an appeal may be taken in any action, suit or proceeding, desiring to appeal therefrom, or some specified part thereof, may by himself or attorney give notice in open court, or before the judge if the order, judgment, or decree be rendered or made at chambers, at the time said judgment, decree or order is made, that he appeals from such decision, order, judgment or decree, or from some specified part thereof, to the court to which the appeal is sought to be taken; and such notice shall thereupon, by order of the court or judge thereof, be entered in the journal of the court. If the appeal is not taken at the time the decision, order, judgment or decree is rendered or

given, then the party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state, and file the original with proof of service indorsed thereon, with the clerk of the court in which the judgment, decree or order is entered. Such notice shall be sufficient if it contains the title of the cause, the names of the parties and notifies the adverse party or his attorney that an appeal is taken to the Supreme or Circuit Court, as the case may be, from the judgment, order or decree, or some specified part thereof. (2) Within 10 days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party, or his attorney an undertaking as hereinafter provided, and within said 10 days shall file the original of said undertaking, with proof of service indorsed thereon with said clerk. Within five days after the service of said undertaking the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto. (3) The qualifications of sureties in the undertaking on appeal shall be the same as in bail or arrest, and, if excepted to, they shall justify in like manner. (4) From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected. When a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order or decree and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay pro-

ceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just. (5) An appeal to the Supreme Court, if not taken at the time of the rendition of the judgment or decree appealed from, or at the time of making the interlocutory order appealed from, shall be taken by serving and filing the notice of appeal, within sixty (60) days from the entry of the judgment, order or decree appealed from or to the Circuit Court within thirty (30) days after such entry and not otherwise: Provided, that in all cases where the right to an appeal to the Supreme Court shall exist at the time this act shall come into force, the time for taking such appeal is hereby extended for the period of sixty (60) days thereafter." This act went into effect June 3, 1913. The notice of appeal and undertaking were served and filed August 2, 1913.

On behalf of the motion it is contended: (1) That the amendment referred to does not operate to extend the time for appeal in any case beyond six months; (2) that, if it be held that such extension is granted by the amendment referred to, the appeal is still a day too late.

1. The first contention of plaintiff has recently been passed upon by this court in *Columbia City Land Co. v. Ruhl*, 70 Or. 246 (134 Pac. 1035), wherein it was held that the amendment in question extended the time for appeal in all cases 60 days from June 3, 1913.

2. Excluding June 3d, the day upon which the law went into effect, and including the last day in the computation of the 60 days, defendant's right to appeal would expire at 12 o'clock, midnight, August 2d. This rule of computation has been followed by this court in the following cases: *Boothe v. Scriber*, 48 Or. 561 (87

Pac. 887, 90 Pac. 1002); *McCabe-Duprey Tanning Co. v. Eubanks*, 57 Or. 44 (102 Pac. 795, 110 Pac. 395); *Pringle Falls Electric Power & Water Co. v. Patterson*, 65 Or. 474 (128 Pac. 820).

These decisions are controlling in this case, and the motion is therefore overruled.

MOTION OVERRULED.

MR. JUSTICE BEAN and MR. JUSTICE EAKIN CONCUR.

MR. JUSTICE McNABY not sitting.

Argued on demurrer March 24, sustained April 13, 1915.
Dismissed on motion of plaintiff, June 21, 1915.

KUBIK v. DAVIS.

(147 Pac. 552.)

Exceptions, Bill of—Nature and Purpose.

1. A "bill of exceptions" is a memorial of matters occurring at the trial of a cause which do not otherwise appear of record.

Exceptions, Bill of—Compelling Allowance—Mandamus.

2. While *mandamus* will lie to compel a circuit judge to sign a bill of exceptions, the Supreme Court cannot dictate to the trial judge what the contents of such bill shall be.

[As to right of private person to *mandamus* to enforce performance of duty by court or magistrate, see note in Ann. Cas. 1912A, 1118.]

Exceptions, Bill of—Compelling Allowance—Mandamus.

3. Under Section 556, L. O. L., providing that, upon appeal from a decree, the suit shall be tried anew upon the transcript and accompanying evidence, findings of fact and conclusions of law, filed by the trial judge in a suit in equity, are not binding upon the Supreme Court, and an order for their filing *nunc pro tunc* did not affect the rights of the parties, and, it not being apparent that such order was final, material, or reviewable, *mandamus* would not lie to compel the trial judge to sign a bill of exceptions in connection with an appeal from the *nunc pro tunc* order, especially as it would seem that the chapter of the statutes relating to bills of exceptions does not apply to suits in equity.

Original proceeding in Supreme Court.

This is an original proceeding in this court by Hattie Kubik against George N. Davis, as judge of the Circuit Court for Multnomah County, asking for a writ of *mandamus* against the defendant. This is a hearing upon a demurrer to the writ.

DEMURRER SUSTAINED.

Messrs. Littlefield & Maguire, for defendant.

Mr. Ellis Richardson, for the plaintiff.

In Banc. Opinion PER CURIAM.

This is an original *mandamus* proceeding in this court whereby it is sought to compel the defendant judge of the Circuit Court for Multnomah County to sign a bill of exceptions in terms prescribed in the alternative writ. From the recitals of that document it appears that, in a divorce suit wherein the plaintiff here was plaintiff and Frank Kubik was defendant, the court over which the present defendant presided as judge entered a decree April 28, 1913, dismissing the complaint at the cost of the plaintiff therein. No findings of fact or conclusions of law were made until December 12, 1914, when, on motion of the defendant in the divorce suit, the court prepared and filed them *nunc pro tunc*, making an order to that effect. The plaintiff here, desiring to appeal from that order, presented a bill of exceptions to the court first having served the same upon opposing counsel, and, after further time had been granted in which to present an amended statement, it appears, as narrated in the writ, that the judge admitted that the new bill was true, but nevertheless declined to sign it because the matters set forth therein were already apparent from

the record of the cause. It was recited further that on February 3, 1915, the plaintiff appealed from the *nunc pro tunc* order. The defendant demurs to the writ.

1, 2. The appealable part of the original proceedings referred to was the final decree dismissing the suit. If the *nunc pro tunc* order has any effect whatever, it must relate to and operate as of the time of the rendition of that decree. A bill of exceptions is a memorial of matters occurring at the trial of a cause which do not otherwise appear of record. Such a document is defined and its requirements prescribed in sections 169 to 172, inclusive, L. O. L. We have in several cases decided that *mandamus* will lie to compel a circuit judge to sign a bill of exceptions in cases where such a document is required, but will not compel him to put into it any particular statement. In other words, we will not dictate the contents of the bill: *National Council v. McGinn*, 70 Or. 457 (138 Pac. 493). Section 170, L. O. L., provides a course of procedure where the parties do not agree with the judge as to the truth of a statement.

3. The distinction between actions at law and suits in equity always has been maintained in the jurisprudence of this state. The chapter on exceptions is contained in that part of the Code relating to actions at law. Treating of suits in equity, Section 409, L. O. L., says:

“The provisions of Chapters VI and IX of Title II of this Code shall apply to suits, but the final determination of the rights of the parties thereto is called a decree, and any intermediate determination is called an order.”

It is to be observed that Chapter 7 of Title 2 is omitted from this category, and it might well be said

that the mention of other chapters could be construed as a rejection of the part relating to exceptions. It is said in *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135), that in equity appeals a bill of exceptions is unnecessary, cannot be considered, and, when accompanying a transcript, must be treated as surplusage, except in so far as the testimony there certified may be applied in determining the issues involved. The same case is authority for the doctrine that failure to make findings of fact and conclusions of law is not ground for reversible error upon appeal. Suits in equity are triable in this court *de novo* upon the transcript and evidence accompanying it: Section 556, L. O. L. Findings of fact and conclusions of law filed by the trial judge in such litigation are not binding upon this court. They are consequently negligible, and, so far as the appellate proceedings are concerned, the *nunc pro tunc* order referred to, directing them to be filed, would not affect the rights of the parties. It is not apparent that the *nunc pro tunc* order on the subject involved is either final, material, or reviewable in a suit in equity. The bill of exceptions is unnecessary, under the circumstances. Neither can we dictate to the trial judge the contents of such a document, even if it were necessary.

Hence the demurrer to the writ is sustained.

DEMURRER SUSTAINED.

MR. JUSTICE BENSON did not sit.

Argued March 12, affirmed April 13, rehearing denied June 22, 1915.

NIELSEN v. PORTLAND GAS & COKE CO.*

(147 Pac. 554.)

Release—Relief—Fraud—Evidence.

1. A release obtained from an injured person who acts without independent counsel or advice should be scrutinized with great care, and, upon proof of any facts fairly tending to show fraud or unconscionable advantage in obtaining it, a jury would be warranted in finding it of no effect.

Release—Conclusiveness—Fraud.

2. Where the evidence discloses no fact or circumstances upon which to base a finding that a release of liability for personal injury was tainted with fraud or imposition, the verdict of a jury upholding the release should not be disturbed.

Release—Vacation—Mistake.

3. In an action for personal injury, that plaintiff may have made an unwise bargain and have been mistaken as to the extent of his injury is no sufficient reason for annulling his release fairly made and executed without any fraud on the part of the defendant.

Release—Validity—Fraud.

4. Unless plaintiff in an action against his master for personal injury was deceived in some way, his release of liability therefor was binding, but, if he was deceived by the doctor employed by defendant, there would be deception by the defendant, and to constitute fraud a representation must be false, as known to defendant actually or by the exercise of ordinary diligence, and made with intent to deceive, and the plaintiff must have been thereby induced to execute the release.

[As to necessity of returning or tendering consideration upon repudiation of release of damages for personal injuries procured by fraud, see note in Ann. Cas. 1912D, 1084.]

Release—Question for Jury.

5. In a servant's action for injury, evidence held not to justify instruction permitting jury to ignore plaintiff's release of damages on account of his innocent mistake as to the extent of his injury.

*For cases passing upon the right, in an action at law, to attack release for fraud, see note in 20 L. R. A. (N. S.) 915.

As to effect of false representations by physician to avoid release, see notes in 5 L. R. A. (N. S.) 663, and 50 L. R. A. (N. S.) 1091.

As to the effect of mistake of servant as to extent of injuries received by him for which he has given a release, see notes in 11 L. R. A. (N. S.) 201 and 48 L. R. A. (N. S.) 449.

Upon the constitutionality, application and effect of the Federal Employers' Liability Act, see note in 47 L. R. A. (N. S.) 38.

REPORTER.

Master and Servant—Action for Injury—Employers' Liability Act.

6. Under the Employers' Liability Act (Laws 1911, p. 16), providing that all persons engaged in the construction of any building or other structure shall use all practicable care for the safety of life and limb, without regard to the cost of safety appliances, a servant's action for injury from the falling of a heavy valve while it was being raised by an improvised derrick came within the general clause of the act, and the employer's negligence in failing to fasten the ends of a pole so as to provide a safe place for plaintiff to work would be a violation of the act.

[As to what is "accident arising out of and in course of employment" within Employers' Liability Act, see note in Ann. Cas. 1914D, 1284.]

Appeal and Error—Affirmance Without Prejudice—Constitutional Provisions.

7. Notwithstanding error in not predicated the case upon the Employers' Liability Act, and in view of Article VII, Section 3, of the Constitution, providing that, if the judgment appealed from was such as should have been rendered, it shall be affirmed notwithstanding any error, committed during the trial, the judgment of the Circuit Court finding that a servant's release of damages for the injury was not procured by fraud will be affirmed without prejudice to his right to sue to cancel the release.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by Harald Nielsen against the Portland Gas & Coke Company, a corporation, to recover damages for a personal injury alleged to have been caused by the defendant's negligence, setting forth the particulars thereof. The answer denied the negligence charged, and for separate defenses averred, in effect: (1) That the plaintiff was an experienced workman who knew and appreciated the dangers to which he was exposed, and assumed the risks incident thereto; (2) that, if the injury complained of was caused by the carelessness of a person other than the plaintiff, the hurt resulted from the negligence of a fellow-servant; (3) that the accident was unavoidable; and (4) that for a valuable consideration the plaintiff executed to the defendant a release, acknowledging full satisfaction and discharge of all claims for dam-

ages arising from, or that might accrue on account of the injury, detailing the facts as to each defense. The reply denied the averments of new matter in the answer, and alleged substantially that the release was procured by the wrongful misrepresentations of the defendant's agent, giving the circumstances thereof. Based on these issues the cause was tried, resulting in a verdict and judgment for the defendant, from which the plaintiff appeals.

The testimony shows that on August 25, 1913, the plaintiff and others employed by the company were engaged in constructing for it at Linton, Oregon, a building to be used in manufacturing briquettes for fuel. A part of the work required the raising about 6 feet from the ground of an iron T-valve, weighing about 500 pounds, placing it in the wall of the building, and securely bolting it. In order to hoist the weight to the proper height, a timber 6"x10"x12', called a "gin pole," was set at an angle against the wall and used as a derrick. A rope was fastened at the top of the plank, forming a sling into which the hook of a heavy iron block was inserted, and from this pulley a chain descended slantingly to another iron block hooked to a sling around the valve. When the weight was being raised by the employees who were hauling on the chain tackle the defendant's overseer directed the plaintiff to go beneath the gin pole and when the valve reached the proper height to bolt it in position. As this order was being obeyed the top of the plank slipped toward the valve, and the improvised derrick, falling, struck the plaintiff's left shoulder, making a bruise along his back. He soon recovered from the shock and tried to resume labor, but his back hurt him so much that he was unable to continue the work,

whereupon he was given a written order to call for treatment upon Dr. O. B. Wight, a physician at Portland, who had been engaged by the defendant to care for its employees when they were hurt while performing services for it. Dr. Wight carefully examined Nielsen when the latter called at the former's office, and found a scratch extending downward from his left shoulder blade, and a very tender spot on his back over the region of the lower ribs, but concluded the muscles only were injured. The next day the physician again saw the plaintiff, who complained of a very severe pain in the back. Another careful examination of the patient was then made by the doctor, who saw him about seven times in two weeks, during which time the scratch had disappeared. As no other evidence of injury was ascertained by Dr. Wight he advised Nielsen to return to his work, telling him some easy job would be given him, and that his injury was slight. Thereupon the plaintiff resumed his labor, doing such easy work as was assigned him. It appears that two or three days after the accident Nielsen thought one of his ribs was broken, and so told the foreman. On September 6th, apparently believing the physician's statement as to the extent of his injury, and relying thereon, in consideration of \$40, paid by the defendant's agent, he subscribed his name to a writing under seal, acknowledging full satisfaction of and discharging defendant from all claims arising or that might accrue in any manner from the injuries received. Nielsen was unable to perform the light duties required of him, and, suffering pain from the injuries which he had received from the fall of the derrick in November, he consulted another physician, who made an X-ray examination of his back and discovered

one of the lower ribs on the left side had been fractured near the spinal column, whereupon this action was instituted without returning or offering to repay the money which he had received as a consideration for the release.

Concluding that the action was founded upon the principles of the common law, and not upon a violation of any of the provisions of the Employers' Liability Act, the court instructed the jury in respect to the separate defenses of the assumption of risk, the carelessness of a fellow-servant, and the plaintiff's contributing negligence. Exceptions were reserved by his counsel as to these parts of the charge. It is argued that, since the pleadings admit, and the testimony conclusively shows, that the defendant was engaged in the construction of a building when the plaintiff was injured, his remedy is predicated upon the statute referred to, and not upon the principles of the common law, and hence errors were committed in the respects mentioned. AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. Isham N. Smith, Edwin V. Littlefield* and *Mr. L. E. Huntsman*, with an oral argument by *Mr. Isham N. Smith*.

For respondent there was a brief over the name of *Messrs. Senn, Ekwall & Recken*, with an oral argument by *Mr. Frank S. Senn*.

MR. JUSTICE BEAN delivered the opinion of the court.

The first question for solution is in regard to the settlement and release. Plaintiff avers in his reply that the physician employed by the defendant "wrongfully and without right kept secret and failed to disclose to

this plaintiff the character and nature of his said injuries, and, upon the assurances of said physician" that his injury was not serious, as detailed, and without knowledge of his true condition, he did agree with defendant to satisfy, release and discharge the latter from any further liability in consideration of the sum of \$40. The evidence on this subject is in part as follows:

"The doctor said there was nothing wrong with me, only my muscles were hurt. * * I was down there. They kept saying all the time, 'Don't sue us; we will take care of you; don't go to law about it.' * *

"Q. Did you tell them that you were going to sue them at that time?

"A. No, sir; I simply had good faith in the company's superintendent; Mr. Ross told me that he would support me and take care of me, and I told him that I couldn't do that work."

To the question, "What did you find to be the matter with him?" Dr. Wight the company's physician, testified in part as follows:

"He had—I saw him in the morning, one morning up in my office—I have forgotten the exact date—and he told me that he had been struck in the back, and I had him strip to the waist and examined his back. He had a scratch on it running from the left shoulder blade down toward the mid line about, I should judge, about a foot long; it wasn't deep, and there was no other external evidences of injury. I examined his back, and he was very tender over, I should say, about the region of the ninth, tenth, and eleventh ribs, about two inches from the middle line, but I got him to bend over, and his back was apparently flexible, and I could make out nothing more than an injury, what I considered an injury to the muscles along in the back. I think I gave him some liniment, something of that sort, and told him to return the next day, and I saw him the

next day, and he still complained of this very severe pain, which was, in a sense, out of proportion to the external evidence of any injury, and I stripped his back, and I saw him off and on then, I think, probably six or seven times in two weeks, or approximately two weeks from the time that he first came to the office, and the condition had cleared up considerably. The scratch had disappeared in three or four days, and I could make out no other evidence of injury than that, and I suggested that he had better go back to work, and that he could get some easy job for a short time, and in that way he would be able to keep on with his work. I thought there was nothing serious as far as the injury was concerned.

“Q. Did you ever examine him for any fractured ribs?

“A. My examination would have made out any— He was very tender, and I examined his back carefully because I naturally thought of that possibility if the condition continued.”

On cross-examination the doctor admits that he never made an X-ray picture; that at the time Mr. Nielsen was hurt there were large X-ray machines in Portland; that it is difficult to recognize a fracture by the fingers; and that his examination was digital.

The trial court treated the allegations of the reply as a foundation of fraud, and submitted the question to the jury upon the basis of the fraudulent representations made by the physician. It charged the jury that, unless the plaintiff was deceived in some way, the release was binding; that, if he was deceived by the doctor employed by the defendant, it would be the same as being deceived by the company; that, to constitute fraud, the representation made must be false, the defendant must have known it to be false, or by the exercise of ordinary diligence should have known it to be false and made with intent to deceive, and that

the plaintiff must have relied thereon and have been led to execute the release. Plaintiff's counsel objected, and excepted to the instruction, and requested the court to charge the jury from the standpoint of a mistake as follows:

"If you believe that at the time the release was signed that Mr. Nielsen did not know his true condition, then the release would not be binding, and you must hold such release void. If you believe that Mr. Nielsen went to a doctor selected by the gas company, and that such doctor did not disclose to the plaintiff the true condition of his injury, and that Mr. Nielsen made the release in ignorance of his true condition, then you are instructed that the release is no part of this case, and you will disregard it in arriving at the verdict."

After a very careful examination of all the evidence, we believe that nothing more can be claimed by plaintiff than that Dr. Wight failed to make a proper diagnosis of his injury; that after the settlement it was ascertained that his injury was greater than it was supposed to be; and that the jury found by its verdict that there was no fraud or imposition practiced upon plaintiff in making the settlement and obtaining the release. From the brief and argument of plaintiff's counsel, as well as from the requested instruction, it seems that plaintiff's contention is that the release should be avoided on the ground of mistake. The good faith of the company's physician in giving the information is not impugned.

1. An agreement of settlement and release obtained from an injured person who acts without independent counsel or advice should be scrutinized with great care, and, upon proof of any fact or facts fairly tending to show fraud or unconscionable advantage in obtaining

it, a jury would be warranted in finding such settlement to be of no effect: *Olston v. Oregon W. P. Ry. Co.*, 52 Or. 343 (20 L. R. A. (N. S.) 915, 96 Pac. 1095, 97 Pac. 538); *Foster v. University Lumber Co.*, 65 Or. 46 (131 Pac. 736); *Woods v. Wikstrom*, 67 Or. 581 (135 Pac. 192).

2. Where the evidence discloses no fact or circumstances upon which to base a finding that the settlement was tainted with fraud or imposition, as in the present case, the verdict of the jury upholding such an adjustment should not be disturbed: *Nason v. Chicago, R. I. & P. Ry. Co.*, 140 Iowa, 533 (118 N. W. 751, 753); *Nelson v. Minneapolis St. Ry. Co.*, 61 Minn. 167 (63 N. W. 486); *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913 (54 C. C. A. 147); *San Antonio & A. P. Ry. Co. v. Polka*, 57 Tex. Civ. App. 626 (124 S. W. 226, 229); *Lawton v. Charleston etc. Ry. Co.*, 91 S. C. 332 (74 S. E. 750).

3. In an action at law for personal injuries, the fact that the plaintiff may have made an unwise bargain and been mistaken as to the extent of his injuries is not a sufficient reason for annulling a settlement and canceling a release fairly made and executed without any fraud or overreaching on the part of defendant: *McFarland v. Missouri Pac. Ry. Co.*, 125 Mo. 253 (28 S. W. 590, 596).

4, 5. There was no error in the giving of the instruction as to fraud, which, we think, fairly submitted to the jury the question pertaining to the release and in refusing to give the requested instruction permitting the jury to ignore the release on account of an innocent mistake. Counsel for plaintiff cite and rely upon the very able opinion in the case of *Lumley v. Wabash R. Co.*, 76 Fed. 66 (22 C. C. A. 60). This was an

equity suit for the purpose of canceling a release obtained by fraud. It was stated therein: "Equity relieves from mistakes as well as fraud."

6. Having arrived at the conclusion that the claim of plaintiff was settled, as found by the verdict of the jury, we must consider the effect of any error of the trial court in holding that the case did not come within the provisions of the Employers' Liability Act (Laws 1911, p. 16). We think the position of plaintiff that the cause should be tried under the statute referred to is well taken. However, viewing the evidence from every angle, if the settlement is upheld, as it must be upon the verdict of the jury, there can be no reason for remanding the cause for a new trial. It should be noted that the law relied upon as applicable to this case enacts, in effect, that all owners or persons whatsoever engaged in the construction, repairing, or painting of any building or other structure, or in the erection or operation of any machinery, or in the use of any dangerous appliance or substance, shall see that all metal, wood or other material whatever shall be carefully selected and inspected and tested, so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained; and all scaffolding more than 20 feet from the ground or floor shall be secured from swaying and provided with a strong safety rail or other contrivance, so as to prevent any person from falling therefrom; and generally, all owners and other persons having charge of, or responsible for any work involving a risk or danger to the employees, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and

limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

The plaintiff and defendant both assert that at the time of the accident defendant was engaged in the construction of a building, and that plaintiff was employed in assistance thereof. The use to be made of the valve which they were raising at the time, and which they assert was a part of the building is not thoroughly explained; but, strictly speaking, whether it was a part of the building or of the machinery would make no difference. It was part of the structure, and undoubtedly the parties were correct in saying that the defendant was engaged in constructing the building. The improvised derrick or gin pole and block and tackle in use at the time of the accident are in the same category as the staging, false work and other things mentioned in the act, all of which are not attempted to be detailed therein, and unquestionably come within the general clause of the section. If there was negligence on the part of the defendant in failing to fasten the end of the gin pole so as to provide a safe place for the plaintiff to work in putting the bolts through the T-valve, which he was attempting to do under the direction of his foreman, there would be an infraction of the Employers' Liability Act: *Heiser v. Shasta Water Co.*, 71 Or. 566 (143 Pac. 917); *Schulte v. Pacific Paper Co.*, 67 Or. 334 (135 Pac. 527, 136 Pac. 5); *Dunn v. Orchard Land & Timber Co.*, 68 Or. 97 (136 Pac. 872, 874); *Browning v. Smiley-Lampert Lbr. Co.*, 68 Or. 502 (137 Pac. 777, 779); *Schaller v. Pacific Brick Co.*, 70 Or. 557 (139 Pac. 913); *Isaacson v. Beaver Logging Co.*, 73 Or. 28 (143 Pac. 938); *Cam-*

eron v. *Pacific Lime & Gypsum Co.*, 73 Or. 510 (144 Pac. 446).

7. Nevertheless, owing to our views heretofore expressed, giving to the provisions of Section 3 of Article VII of the Constitution a partial application, and not a literal one, the judgment of the Circuit Court should be upheld without prejudice to plaintiff's right to institute a suit to cancel the release, notwithstanding there was error in not predicating the case upon the statute: *Wasiljeff v. Hawley P. & P. Co.*, 68 Or. 487 (137 Pac. 755, 759); *Schaedler v. Columbia Contract Co.*, 67 Or. 412 (135 Pac. 536).

The judgment of the lower court is therefore affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE BENSON and MR. JUSTICE HARRIS CONCUR.

MR. CHIEF JUSTICE MOORE CONCURS IN THE RESULT.

Argued February 1, reversed February 23, 1915. Rehearing allowed and reargued June 2, former decision upheld June 22, 1915.

WOLSIFFER v. BECHILL.

(146 Pac. 513; 149 Pac. 533.)

Master and Servant—Liability for Injuries—Relation Between Parties.

1. Under a contract with a city to grade a street, which provided that the work should be performed under the personal supervision of the contractor, that no part of the contract should be sublet, assigned or transferred without the written consent of the city, and that no such written consent should release the contractor from any obligation either to the city, or to persons employed by any subcontractor, where the contractors sublet a part of the work without the city's consent, they were liable for injuries to a subcontractor's employee as if he had been in their employ, as the city in the control of its streets and the improvement thereof was exercising a governmental function, and its contracts operated at least upon the parties concerned with the force of a law.

Master and Servant—Actions for Injuries—Questions for Jury.

2. In an action for injuries to an employee of parties engaged in grading a street, caused by falling into a pit which was being filled and alleged to have been due to the failure to provide a safety rail, or similar contrivance to prevent such accidents, the court erred in charging that the case came under the Employers' Liability Act (Laws 1911, p. 16), and that it was for the jury to determine whether such a device as was alleged in the complaint could have been furnished without impairing or destroying the efficiency of the work, as no part of the liability act could apply except the general provision of Section 1 that all owners, contractors or subcontractors, and other persons having charge of, or responsible for, any work involving risk or danger to employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus, and it was for the jury to determine whether the work involved a risk or danger to employees or the public, and whether it was practicable to use a safety rail, or other contrivance.

[As to duty of master to servant, see note in 75 Am. St. Rep. 591.]

Master and Servant—Liability for Injuries—Safety Appliances.

3. That a contract with a city did not require the contractor to provide a safety rail or other contrivance to prevent employees from falling into a pit did not relieve the contractor of liability if such contrivance was required by the Employers' Liability Act.

[As to duty of master to provide safe place for servant to pass to and from work, see note in Ann. Cas. 1913E, 1033.]

From Multnomah: THOMAS J. CLETON, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by Fred Wolsiffer against Thos. A. Bechill and W. A. Bechill, copartners doing business as Bechill Bros., and J. P. O'Donnell.

The complaint charges, in substance, that the individuals composing the firm of Bechill Bros. and one O'Donnell, as contractors, were grading a street in the City of Portland using various implements drawn by horses and mules for that purpose; that in doing so they were filling a deep pit partly in the street and required the teams thus engaged to be driven along the head of the slope formed by pouring the loose earth into the excavation; that, although it was practicable

to use a safety rail or some such contrivance to prevent employees from falling into the pit, the defendants negligently failed to provide the same; that during the progress of the work one of the horses fell, and, while under direction of the defendants he was helping the animal to his feet, the plaintiff by the action of the horse was suddenly thrown with great force and violence to the bottom of the pit, whereby he sustained injuries resulting in the fracture of his right femur to his damage.

The answer of Bechill Bros. denies every allegation in the complaint except the one narrating their partnership. They affirmatively defend on the ground that the defendant O'Donnell was an independent contractor in charge of the work and that they had no control over the same. They also interpose the defenses of assumption of risk and contributory negligence on the part of the plaintiff. The answer of the defendant O'Donnell is like that of Bechill Bros., except that he omits the defense of independent contractor.

The replies deny the new matter in each answer. Further replying to the answer of Bechill Bros., the plaintiff alleges that, by virtue of certain ordinances pleaded, they had entered into a contract with the City of Portland for making the improvement in question in which:

They "agreed that no part of the work thereunder should be sublet or assigned without the written consent of the City of Portland, and that the said Thos. A. Bechill and W. A. Bechill should give personal supervision and should have personal charge of the work covered by said contract, and that any persons working under them should be considered merely as employees of said Thos. A. Bechill and W. A. Bechill;

that no consent in writing to any assignment or subletting of the contract hereinbefore mentioned was ever made or entered into by the City of Portland or by any persons in its behalf."

A jury trial resulted in a verdict and judgment in favor of the plaintiff against all the defendants, and they appeal.

REVERSED. DECISION UPHOLD ON REHEARING.

For appellants there was a brief over the name of *Messrs. Wilson & Neal*, with an oral argument by *Mr. O. A. Neal*.

For respondent there was a brief over the names of *Messrs. Abel & Burnett* and *Messrs. Richards & Richards*, with oral arguments by *Mr. Coy Burnett* and *Mr. O. R. Richards*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The first question to be considered is the relation, if any, existing between the plaintiff and Bechill Bros. The accident happened February 6, 1913. There is in evidence an agreement in writing dated November 10, 1912, between O'Donnell and Bechill Bros., whereby the former was to do the grading, involving the filling of the pit already mentioned, according to the engineer's plans and specifications, and to receive as compensation 20 cents per cubic yard for excavation and nothing for fill. It was admitted that Bechill Bros. had entered into a contract with the City of Portland in pursuance of a special ordinance authorizing the improvement in question, which agreement contained this condition:

"The said work shall be performed under the personal supervision of the contractor, and no part of this contract, nor any interest therein, shall be sublet, assigned or transferred without the written consent of said city, by its executive board, and no such written consent shall release the contractor from any obligation, either to said city or to the persons employed by any subcontractor, and all subcontractors shall be considered merely as employees of the contractor and may be discharged by said city for incompetency, neglect of duty or misconduct."

The evidence likewise tended to show that the plaintiff was not on the pay-roll of Bechill Bros., but was employed directly by O'Donnell and paid by him. It was also admitted that no consent had been given by the city or by anyone representing it authorizing Bechill Bros. to sublet any of the work to O'Donnell. What then is the legal conclusion to be drawn from this record respecting the relation existing between the plaintiff and the defendants?

In the control of the streets within its boundaries and the improvement thereof, the City of Portland was exercising a governmental function. Its ordinances and contracts made in pursuance thereof operate at least upon the parties concerned with the force of a law. It is analogous to the principle announced by Mr. Chief Justice BEAN in *Salem v. Anson*, 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169). There the City of Salem had granted a franchise to the defendant Anson to use its streets, alleys and highways for the purpose of establishing and maintaining an electric light plant in the city, and had exacted from him a bond in the sum of \$5,000, conditioned that he should install his plant and have it in operation by a date named. He utterly failed to construct the plant

in any respect, and the city brought an action to recover the amount of the bond. The court there said:

"The ordinance granting to Anson the right and privilege to use the streets and highways of the city in the construction and maintenance of his plant had the force and effect of a statute, and by his acceptance of its provisions he became bound to comply with its terms as a statutory duty."

The ordinance under which the contract was promulgated in the case at bar required that:

"The contractor or contractors for said improvement shall take entire charge of the work during its progress and shall be responsible for any loss or accident resulting from carelessness or negligence and the improvement shall be completed to the satisfaction of the executive board of the said City of Portland."

By stipulating as they did under the ordinance mentioned, Bechill Bros. in a sense assumed a statutory obligation, the benefit of which inures to any person coming within its terms. They agreed that the contractor should not be released from any responsibility either to the city or to the persons employed by any subcontractor. Under these circumstances, they could not evade their statutory duty by subletting the work to O'Donnell, and, when they attempted to install the latter as an independent contractor, the only effect accomplished as to the questions here involved when measured by their engagement with the city was merely to make him an employee in charge of the work. In short, the dealing with O'Donnell by Bechill Bros. was in derogation of a duty imposed upon them by the very ordinance and the contract under which they were operating and cannot affect their obligation to the plaintiff. In principle it comes within the doctrine

of *Ackles v. Pacific Bridge Co.*, 66 Or. 110 (133 Pac. 781), where Mr. Chief Justice McBRIDE said:

“Where a statute or city ordinance requires certain precautions to be taken for the safety of the public in the manner of doing the work, the contractor cannot shift his liability for failure to take these precautions by employing a subcontractor: *Colgrove v. Smith*, 102 Cal. 220 (36 Pac. 411, 27 L. R. A. 590); *Luce v. Hol-loway*, 156 Cal. 162 (103 Pac. 886); *Storrs v. City of Utica*, 17 N. Y. 104 (72 Am. Dec. 437); *North Chicago St. R. R. Co. v. Dudgeon*, 184 Ill. 477 (56 N. E. 796); *Robbins v. Chicago City*, 4 Wall. 657 (18 L. Ed. 427); *Hawver v. Whalen*, 49 Ohio St. 69 (29 N. E. 1049, 14 L. R. A. 828); *Werthheimer v. Saunders*, 95 Wis. 573 (70 N. W. 824, 37 L. R. A. 146).”

In *Morgan v. Bross*, 64 Or. 63 (129 Pac. 118), the defendant was a contractor engaged in the construction of a brick building, and the plaintiff was a plumber installing pipes on the first floor beneath where the defendant and his employees were at work on the fourth story. The action was instituted under the employers' liability law, the substance of the charge being that for want of temporary floors in the edifice, as required by a building ordinance of the City of Portland a brick falling from where the defendant was at work struck the plaintiff and injured him. At the trial the defendant was refused the right to show that the man in charge of the carpenter work had agreed to install the temporary floors. This court, however, approved this action of the Circuit Court, speaking by Mr. Justice MOORE in this language:

“The obligations to lay such coverings, in order to protect the life and limbs of persons employed in a building under construction, having been placed by the statute and ordinance referred to on a contractor,

the defendant, who sustained that relation to the owner, could not escape liability for a neglect to comply with such requirements by showing that the carpenter had agreed to discharge that duty."

2. The principal error assigned by all the defendants is that the Circuit Court was mistaken in holding the case to be one stated under the initiative act of November, 1910, and commonly known as the employers' liability law (Chapter 3, p. 16, Laws 1911; L. O. L. xxxvi). That is a statute which specifies in its title that:

It is "for the protection and safety of persons engaged * * in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer. * * "

Section 1 of that act, so far as deemed even possibly applicable to the case in hand, reads thus:

"All owners, contractors, subcontractors, corporations, or persons whatsoever, engaged in the construction, repairing, alteration, removal, or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission, and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work, or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging, or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient

safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings, and similar places of danger shall be inclosed, * * and generally, all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 2 declares:

"The manager, superintendent, foreman, or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee."

Because of the terms of the ordinance and the contract made by Bechill Bros. with the City of Portland, they could not shuffle off their responsibility for injury happening upon their works to one rightfully in employment there. In actually subletting the contract to O'Donnell, as already pointed out, they effected nothing more than to place him in charge and control of the work. By virtue of Section 2 of the act, there was cast upon him by operation of law as a result of this transaction an agency on behalf of the defendants Bechill Bros., and, when he employed the plaintiff to work on the improvement, the legal effect that transaction had was to make the latter the employee of Bechill Bros. if that were necessary to give him the

benefit of the act. In substance, when the plaintiff accepted employment from O'Donnell under the circumstances disclosed by the record, he was contracting with an agent of undisclosed principals, Bechill Bros., who are liable when discovered.

To bring himself within the statute, plaintiff alleges that in the prosecution of the undertaking mentioned the defendants used "in all of said work and at all of said times, plows, slips, fresnoes, wheel-scrapers, dump-wagons, horses and mules, and that said wheel-scrapers, fresnoes and dump-wagons constitute and are machinery, and that as such contractors the defendants were jointly engaged in the construction, repairing and alteration of a structure, and in the operation of machinery, and that such work so carried on by defendants involved a risk and danger to the plaintiff and to their employees and to the public."

The defendant excepted to the following instruction given by the trial judge:

"The court determines this case to come under the Employers' Liability Act, for the reason that it holds this fill to be a structure in the meaning of the act, and the law says all structures shall be guarded with every reasonable device; every practicable device which does not impair or destroy the efficiency of the work being carried on. You must first determine whether such a device as was alleged in the complaint, and not furnished, could have been furnished, would have been practicable, and if furnished would not have impaired or destroyed the efficiency of the work. That will be the first thing for you to determine here."

It is charged, indeed, that the defendants were negligent in failing to provide a safety rail or some such contrivance to prevent the plaintiff and other employees from falling into the excavation being filled.

So far as a railing *eo nomine* is concerned, the statute only requires that to be attached to scaffolding, staging, or other structure more than 20 feet from the ground or floor. It is not pretended that any such "scaffolding, staging or other structure" was in use on the works mentioned. The plaintiff was not at any time 20 feet from the ground. Neither is it claimed that the accident happened on account of any defect in any of the implements or machines in use at the time. Failure to see that "all metal, wood, rope, glass, rubber, gutta-percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects," is not laid to the charge of the defendants. It is clear that nothing is alleged here constituting a violation of the detailed specifications appearing in the first part of Section 1 of the act in question. If a cause of action exists in the case at bar, it must be classified under the general clause at the end of the section imposing liability upon those engaged in "any work involving a risk or danger to the employees or the public." The testimony clearly establishes, that the plaintiff was rightfully present on the work as a hired laborer. Whether the work involved a risk or danger to employees or the public, and whether it was practicable to use the device mentioned in the pleadings for the safety of those engaged in the service, are questions of fact put in issue by the pleadings to be determined by the jury. By his peremptory instruction that the case comes under the Employers' Liability Act, on the ground that the fill was a structure, the trial judge to all intents and purposes took from the jury the right to decide these issues of fact. Under the pleadings here, the only allegation of fact bringing the case within the terms

of the act is the disputed one of whether or not the work involved risk or danger to the employees. It was the duty of the presiding judge to submit this question of fact to the jury; whereas, in very truth, he practically decided it himself under the instruction quoted. While we hold that a cause of action is stated under the statute mentioned, yet the traversed averments of fact must be left to the decision of the jury.

3. The defendants also contend that the complaint was subject to general demurrer because it did not state that the alleged injury was caused by failure to perform any act required by the contract to be performed. It is true the measures to be taken for the safety of employees are not prescribed by that agreement. These result from the operation of the statute, and the defendants cannot excuse themselves because they were not compelled by their agreement or the ordinance to use the particular device mentioned in the complaint.

For the error in giving the instruction above quoted, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

APPROVED ON REHEARING.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE
and MR. JUSTICE BENSON concur.

Reargued June 2, former opinion approved June 22, 1915.

ON REHEARING.

(149 Pac. 533.)

In Banc. MR. JUSTICE MCBRIDE delivered the opinion of the court.

Since this case was reargued, we have given it careful consideration, and still adhere to the views expressed in the opinion filed February 23, 1915. For the reasons there given, our former decision is upheld.

FORMER OPINION APPROVED ON REHEARING.

Argued May 3, affirmed May 18, rehearing denied June 22, 1915.

DALE v. MARVIN.

(148 Pac. 1116; 148 Pac. 1151.)

Statutes—Adoption of Statute of Sister State—Construction.

1. Where the legislature adopts a statute from another state, the construction given the act by the courts of the other state prior to its enactment in this state usually governs in interpreting such act here.

Husband and Wife—Household Expenses—Liability on Note—Statute.

2. Under Section 7039, L. O. L., providing that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and that in relation thereto they may be sued jointly or separately, although an action at law may be maintained against a married woman for the value of goods purchased by her husband and used as family necessities, yet the reality of a wife cannot be subjected to the payment of a note given by her husband to evidence his liability to a tradesman for household supplies; her liability under the statute being only upon the original account for goods sold and delivered.

[As to conflict of laws relating to the liability of married woman, see note in 46 Am. St. Rep. 446.]

Constitutional Law—Due Process of Law—Separate Property—Liability for Household Goods—Constitution—Statute.

3. Where a creditor, to whom a husband had given a note representing his liability for household goods, sought to enforce against

the wife her joint liability with the husband for such expenses under Section 7039, L. O. L., by levying execution upon the wife's homestead estate under judgment against the husband alone in an action on his note, the attempt was in contravention of the organic law, which guarantees to a citizen the right of trial by jury before he or she may be deprived of property, unless the wife's realty was fraudulently conveyed to her by her husband.

[As to liability of wife for necessities, see note in 31 Am. Rep. 697.]

Judgment—Conclusiveness—Persons Bound—Husband and Wife.

4. A wife is not bound by judgment in an action against her husband to which she was not a party.

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Mary E. Dale against Edgar Marvin, Sheriff, and others to enjoin a threatened clouding of the title to real property. The complaint charges, in effect, that pursuant to the provisions of the laws of the United States, James H. Dale, prior to the year 1900, made a homestead entry upon a tract of land, particularly describing the premises, in Wallowa County, Oregon; that on March 9, 1900, he gave to the defendants Bart Stephenson and F. M. Hitt, partners as Stephenson & Hitt, his promissory note for \$170, maturing in six months, with interest at 10 per cent, stipulating to pay such additional sum as the court might adjudge reasonable as attorney's fees, in case an action was commenced to collect the note or any part thereof; that a patent was issued to Dale for his homestead April 9, 1901; that on March 4, 1903, Stephenson & Hitt commenced an action in a Justice's Court of that county against Dale to recover the amount of the note; that eight days thereafter, and while that action was pending, Dale executed to his wife, the plaintiff herein, a deed to his homestead, which conveyance was duly recorded the day it was

made; that on March 16, 1903, judgment was given in that action for the amount of Dale's note, attorney's fees, costs and disbursements, and three days thereafter a proper transcript of the judgment was duly entered in the judgment docket of the Circuit Court for that county; that on March 11, 1913, by consideration of the latter court, the judgment referred to was renewed and re-entered in the judgment docket; that four days thereafter Stephenson & Hitt caused an execution to be issued on the judgment, and delivered the writ to the defendant Edgar Marvin, the sheriff of that county, who levied upon the plaintiff's land and advertised it for sale; that a sale of the premises, if allowed to be made, will cloud the title to the plaintiff's real property to her irreparable injury; and that the promissory note mentioned, having been given before the patent was issued, the homestead, under Section 2296, Revised Statutes of the United States (U. S. Comp. Stats. 1913, § 4551), is exempt from execution. The answer admitted all the averments of the complaint, except that the threatened sale of the land would be to the plaintiff's irreparable injury, and that the premises were exempt from execution, which averments were denied. For a further defense it was alleged, in substance, that prior to the giving of the note, Stephenson & Hitt sold and delivered to Dale, at his request, groceries, clothing, dry-goods, and farming utensils of the reasonable value of \$170, which goods, etc., were purchased for and used by the plaintiff and her husband as family expenses, and that to evidence the amount so due and owing, but not as payment thereof, the promissory note was given and accepted. The answer practically reiterates the averments of the complaint, and for a second defense alleges that for a valu-

able consideration Dale executed to his wife a deed of his homestead, which land is subject to the payment of the judgment mentioned. For a third defense it is averred that on August 27, 1907, the plaintiff secured the legal title to another tract of land in that county, particularly describing the premises, which real property is also liable to the payment of the judgment referred to. A motion to strike out the second and third defenses was allowed, and a demurrer to the remainder of the averments of the answer was sustained, whereupon a decree was rendered as prayed for in the complaint, and the defendants appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. Thomas M. Dill*.

For respondent there was a brief over the name of *Messrs. Sheahan & Cooley*, with an oral argument by *Mr. A. S. Cooley*.

Opinion by MR. CHIEF JUSTICE MOORE.

The statute declaring the liability of each spouse for household outlays reads:

“The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and in relation thereto they may be sued jointly or separately”: Section 7039, L. O. L.

This law, enacted in the year 1878, was evidently borrowed from Iowa, for the statute of that state upon this subject is identical with the language quoted: Ann. Code of Iowa, 1897, § 3165; *Watkins v. Mason*, 11 Or. 72 (4 Pac. 524). The defendants' counsel assert that, having thus appropriated the statute of

Iowa, the construction put upon the enactment by the Supreme Court of that state was also adopted, whereby the rule established in the case of *Frost v. Parker*, 65 Iowa, 178 (21 N. W. 507), is controlling herein, and, this being so, errors were committed in awarding the relief granted. In the case relied upon the defendant husband gave his promissory notes for an organ which was used in the family. During the pendency of an action on the notes against the husband he executed a deed of his real property to another person, who immediately conveyed the premises to the defendant's wife. A judgment, rendered in that action against the husband alone, was transferred, and the assignee instituted a suit in equity against the husband and wife to subject her land to the lien of the judgment, alleging in the bill that the conveyances were fraudulent, and that the debt for which the judgment was rendered was contracted for family expenses. In deciding that case it was held that the purchase of the organ was an expense incurred on account of the family; that though the husband gave his individual note for the musical instrument, and judgment against him alone was rendered, the plaintiff, as assignee of the judgment, was entitled to the relief sought, and that such right to equitable relief was not barred by the statute of limitations so long as the debt, in the form which it had assumed, was not barred against the husband. Mr. Justice BECK, in reaching that conclusion, observes:

"We find it unnecessary to inquire into the good faith and validity of the deeds under which the wife claims title to the land, for the reason that, if it be conceded that they are valid, and that her title is not tainted by fraud, the land, as well as the lots, may in this action, be held subject to plaintiff's judgment."

Further in the opinion the writer, referring to the statute of Iowa, says:

“Here a right is created and a liability declared, but no remedy is provided or pointed out. The right declared is that the creditor of the husband or wife, for family expenses, may have a remedy against both. The liability created is that both shall be liable for family expenses. The remedy to enforce the provision is not pointed out further than that the indebtedness contemplated by the provision may be ‘chargeable upon the property of both husband and wife.’ It has been held that under this provision each is personally liable. * * But it cannot be held that the remedy under this provision is limited alone to a personal judgment, and that, by proper proceedings, the property of the wife may not be pursued without the claim for a personal judgment against her. This is precisely what plaintiff seeks to do in this case. No prejudice results to the wife by seeking to enforce the debt against her property without asking a personal judgment against her. The statute, in declaring that her property shall be charged, clearly implies that a remedy against it is contemplated.”

1. When the legislative assembly of Oregon adopts a statute from another state, the construction given to the act by the court of last resort of the state from which the law was borrowed, made prior to its enactment in this state, usually governs the interpretation in Oregon: *State v. Townsend*, 60 Or. 223 (118 Pac. 1020); *Hoskins v. Dwight*, 69 Or. 558 (139 Pac. 922). In *Black v. Sippy*, 15 Or. 574 (16 Pac. 418), which was an action to recover the value of merchandise purchased for and used by a family as necessary expenses, it was ruled that a promissory note, given by the husband to evidence the purchase price of the goods, might be disregarded and a recovery had against the wife upon an itemized exhibit of the articles of merchandise

sold and delivered. In that case Mr. Chief Justice LORD, referring to the cases of *Frost v. Parker*, 65 Iowa, 178 (21 N. W. 507), and *Phillips v. Kirby*, 73 Iowa, 278 (34 N. W. 855), decided, respectively, December 4, 1884, and October 27, 1887, says:

“As a result of the reasoning of these authorities under an identical provision, the wife is liable for necessities incurred as a family expense, although originally charged to the husband, and for which he had given his note; nor will the transfer of the note discharge her from such liability.”

In a concurring opinion, Mr. Justice STRAHAN observes:

“I yield an assent to this decision solely on the principle of *stare decisis*. When the legislature used the terms ‘chargeable upon the property,’ they were using language the signification of which had received a judicial construction, and was fixed in equity, and it ought to be held, therefore, that such language was used in that sense. The effect of such construction would be to create a new remedy in equity against the property of both husband and wife for the necessities of the family; but Iowa, whence this statute was taken, had given it a different construction prior to its adoption here, which I suppose upon well-settled principles we are compelled to follow.”

2. That an action at law may be maintained against a married woman to recover the reasonable value of goods, wares, and merchandise purchased for and used as family necessities is conceded under the practice prevailing in Oregon. She is not liable, however, on a contract based on an account stated between her husband and the merchant who sold and delivered goods of that kind: *Holmes v. Page*, 19 Or. 232 (23 Pac. 961). A married woman would therefore not be liable on a promissory note executed by her husband

to evidence the purchase price of family expenses. This conclusion repudiates the doctrine promulgated in *Frost v. Parker*, 65 Iowa, 178, (21 N. W. 507), which case was decided after the enactment of Section 7039, L. O. L., and hence the rule so announced is not controlling in the case at bar. The statute referred to creates, as to the husband and wife, a personal liability which may be enforced in an action at law against them jointly or severally. If both have not joined in executing a promissory note, or assented to the accuracy of an account stated to evidence the value of the necessities purchased, a recovery can be had against the spouse who did not join in giving or consenting to such memorandum only upon the original account of the goods sold and delivered.

3. Section 7039, L. O. L., does not treat the marital relation as a partnership, so that the signing of the firm name to a promissory note by one spouse, to evidence expenses incurred on account of the family, is thereby rendered an obligation binding upon the other, who did not join in executing the writing. While the husband and wife may be sued jointly for family expenses, an action for such recovery is usually several and brought against the party who owns property which by the statute is made chargeable with such expenses, and such being the general practice, the spouse who has no property, though he may, in the first instance, impose a burden upon the property of his life associate, for the value of such goods as he may purchase as family necessities, ought not to be permitted by any act of his own to extend the statute of limitations against the other spouse who, in our opinion, is not a surety, as has been held in some other jurisdictions. Each spouse under the organic law of

this state is guaranteed the right of a trial by jury, in an action at law, before his property becomes ultimately liable for the payment of the reasonable value of goods sold and delivered, assuming always that no fraud has been practiced by a conveyance of property from one spouse to the other in anticipation of the rendition of a judgment in such action, in which case equity would undoubtedly afford relief if no laches had occurred.

4. In the case at bar, it will be remembered, the answer avers that the plaintiff secured a conveyance from her husband of his homestead for a valuable consideration. She never had an opportunity to contest an averment of the quantity of goods sold and delivered, or to challenge the value thereof. She is not liable upon the promissory note given by her husband to evidence the purchase price of such merchandise, nor is she bound by the judgment rendered against him since she was not a party to that action. As to her, the statute of limitations of six years has run against the original demand.

The conclusion reached renders it unnecessary to consider Section 2296 of the Revised Statutes of the United States, exempting homesteads from enforced sales upon execution. No error was committed as alleged, and the decree is affirmed.

AFFIRMED. REHEARING DENIED.

Denied June 22, 1915.

ON PETITION FOR REHEARING.

(148 Pac. 1151.)

Mr. Thomas M. Dill, for the petition.

Messrs. Sheahan & Cooley, contra.

In Banc. Opinion by MR. CHIEF JUSTICE MOORE.

In a petition for a rehearing it is maintained that an error was committed in holding the statute of limitations was not extended as to the plaintiff whose husband, in order to evidence the purchase price of goods, wares and merchandise bought for and used as family expenses, had executed therefor a promissory note upon which obligation a judgment was rendered; and that Section 7039, L. O. L., having been obtained from Iowa, the construction placed upon the statute by the Supreme Court of that state prior to its adoption in Oregon is controlling herein. Our statute was enacted in the year 1878. In *Lawrence v. Sinnamon*, 24 Iowa, 80, decided January 28, 1867, in construing the Iowa statute, it was held that the husband being the head of the family was not only authorized to make purchases of household expenses in his own name, but to change the form of evidence of the indebtedness arising therefrom by executing his promissory note for the amount, thereby taking the case out of the statute of limitations as to the wife.

In *Polly v. Walker*, 60 Iowa, 86 (14 N. W. 137), decided December 7, 1882, a judgment was rendered against a husband, with his consent in the year 1867, for the value of goods purchased for use in the family

as necessaries. In March, 1881, the husband being insolvent and the judgment remaining unpaid, an execution issued thereon was levied upon the real property of the wife, who thereupon instituted a suit to enjoin the sale. A cross-bill was interposed by the defendants, alleging that the husband and wife were liable for the value of the goods so sold, and that taking a judgment against him alone, did not in any manner release her from the debt or relieve her property from liability. A demurrer to the cross-bill, on the ground that the cause of suit was barred by the statute of limitations, was sustained and the defendants appealed. In affirming the decree, Mr. Justice ROTHBOCK, speaking for the court, says:

“Counsel for appellant contends that, although this debt was contracted prior to 1867, and suit was brought in that year against the husband alone, and judgment obtained against him, without any reference to the wife or her property, the judgment, or rather the original claim, may now be made a charge upon her property, because the judgment is not barred by the statute of limitations as against the husband. In other words, it is claimed that, so long as the debt exists against the husband, it may be enforced as a charge or lien upon the wife’s property; and reliance is had upon the case of *Lawrence v. Sinnamon*, 24 Iowa, 80.” Further in the opinion it is observed: “When the judgment was rendered against the husband for this debt, although it operated to extend the time within which the claim could be collected of him, it was not a contract binding upon the wife, nor in any manner connecting her with it, as in the case of *Lawrence v. Sinnamon*, *supra*. In our opinion the demurrer to the cross-petition was correctly sustained.”

Relying probably upon the rule announced in *Polly v. Walker*, 60 Iowa, 86 (14 N. W. 137), but not refer-

ring to that case, it was held in *Black v. Sippy*, 15 Or. 574 (16 Pac. 418), an action to recover the value of merchandise sold and delivered, decided in January, 1888, that the wife was liable for goods purchased for family use, although sold to the husband on his individual credit, and that he might change the form of indebtedness by giving his promissory note for the account, without releasing her.

So, too, in *Holmes v. Page*, 19 Or. 232 (23 Pac. 961), decided in May, 1890, it was ruled that where goods were purchased and used as family expenses, either the husband or the wife was liable in an action for them, but that the wife could not be held on an account stated between her husband and the merchants, to which contract she had not assented. It will thus be seen that this court, in deciding the cases last cited, followed the rule adopted by the Supreme Court of Iowa in *Polly v. Walker*, 60 Iowa, 86 (14 N. W. 137). Without referring to that case, so far as we have been able to ascertain, other decisions of that court seem to have departed from the legal principle thus promulgated.

In *Fitzgerald v. McCarty*, 55 Iowa, 702 (8 N. W. 646), it was held that a wife could not be charged with attorney's fees and interest at a greater rate than that prescribed by statute, when no contract to that effect had been made, because her husband had given a promissory note stipulating therefor, to evidence the purchase price of goods obtained and used as family expenses.

The statute imposes upon the property of the husband and the wife a joint and several liability for the reasonable value of goods, wares and merchandise purchased by either spouse and used in the family

as necessary expenses. The burden thus cast results from a proceeding *in invitum* and repels the presumption that one spouse is the agent for the other, and while the statute of limitations may be extended by one of the parties, the other is not bound thereby. The remedy against the one who did not join in executing a promissory note or in assenting to a stated account must be based upon an itemized account of the goods sold and delivered, and the action must be instituted, in order to be maintainable, within six years from the sale of such merchandise.

We adhere to the former opinion, and the petition for a rehearing is denied.

AFFIRMED. REHEARING DENIED.

Argued May 3, affirmed May 18, rehearing denied June 22, 1915.

EVANS v. MARVIN.

(148 Pac. 1119; 148 Pac. 1121.)

Quietng Title—Actions—Burden of Proof.

1. In a suit to quiet title, where plaintiff proved the allegations of ownership, which were denied, defendants have the burden of establishing the validity of the judgment against plaintiff's grantor which furnished the basis for their claim.

[As to necessity that plaintiff, in action to quiet title, allege title or possession at time of its commencement, see note in Ann. Cas. 1913D, 388.]

Justices of the Peace—Judgment—Pleading.

2. Under Section 87, L. O. L., declaring, in pleading a judgment or other determination of a court of special jurisdiction, it shall not be necessary to allege the facts conferring jurisdiction, but such judgment may be stated to have been duly made, and, if such allegation be controverted, the party pleading shall be bound to establish the facts conferring the jurisdiction, a party relying on the judgment of a Justice's Court must prove the facts conferring jurisdiction.

Justices of the Peace—Judgment—Jurisdiction.

3. Section 951, L. O. L., declares that a Justice's Court has jurisdiction of actions to recover money or damages when the amount

claimed does not exceed \$250, and for the recovery of statutory penalties and personalty of a value not exceeding that sum. Section 952 provides that justice shall not have jurisdiction of actions involving title to real property, or of actions for false imprisonment, libel, slander, malicious prosecution, etc. The exemplification of a journal of a justice, showing the entry of a default judgment, did not disclose the nature of the action upon which judgment was rendered. *Held*, that a party relying on the validity of such judgment could not maintain a lien by reason thereof; it not appearing that the justice had jurisdiction.

Judgment—Lien—Justices.

4. Section 771, L. O. L., provides that, when a copy of a writing is certified to be used in evidence, the certificate shall state that the copy was compared with the original. The certificate by a justice to a copy of a judgment which was filed in the office of the county clerk in accordance with Section 2442, L. O. L., merely recited that it was a full, true and correct copy of the justice's docket. *Held*, that the certificate was insufficient, and the filing created no lien.

[As to docketing of judgments by justices of the peace, see note in 40 Am. Dec. 386.]

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by Charles E. Evans against Edgar Marvin, as sheriff, and Stephenson & Hitt.

Plaintiff, alleging himself to be the owner in fee simple and in the actual possession of certain real property ever since July 22, 1910, states that on March 15, 1913, the defendants Stephenson & Hitt caused an execution to be issued out of the Circuit Court, under the seal thereof, in favor of themselves and against one Carpenter; that, the same having been placed in the hands of defendant Marvin, as sheriff, he sold the property to Stephenson and Hitt, and issued a certificate of sale thereof, which sale was afterward confirmed by the court; and that they threaten to issue a deed in pursuance of said sale. He further asserts:

“Stephenson and Hitt have no right, title, claim or interest in and to said premises, or any part thereof, and that said plaintiff is the *bona fide* owner in fee simple of said premises and the whole thereof; that

the issuance of such deed would create a cloud upon plaintiff's title, to his irreparable injury and damage to his title."

The prayer of the initial pleading is to the effect that the court annul all proceedings under the execution, perpetually enjoin the defendants from further proceeding in the premises, and that the plaintiff be declared the owner in fee thereof, free from all claims of the defendants, or of either of them. The answer admits the issuance of the execution and proceedings in pursuance thereof, but denies all other allegations of the complaint. Affirmatively it states:

"That on the 5th day of March, 1903, an action was commenced in the Justice Court for the district of Lostine, in Wallowa County, Oregon, by the defendants herein, the said Bart Stephenson and the said F. M. Hitt, as plaintiffs in said action, against one A. J. Carpenter, as defendant in said action, and that said action was commenced by the filing of a complaint therein and issuing a summons therefrom, and that in said action in said Justice Court a judgment was duly given, made, and entered on the 16th day of March, 1903, in favor of said Bart Stephenson and said F. M. Hitt, as plaintiffs, in said action, and against the said A. J. Carpenter, in the sum of ninety-four and 60/100 dollars (\$94.60), and the further sum of ten dollars attorney's fees and the costs and disbursements of said action taxed and allowed at \$8.75; that on the 19th day of March, 1903, a certified transcript of said judgment, together with a certified copy of the docket entries made by the justice of the peace of said Lostine District in said action, was filed with the county clerk of Wallowa County, in the State of Oregon; and on said 19th day of March, 1903, said county clerk docketed and entered said judgment in the judgment docket of the Circuit Court of the State of Oregon for Wallowa County, and that on or about the 11th day of March, 1913, the said Stephenson and

Hitt caused and procured a renewal of said judgment to be made by said Circuit Court, and a new entry thereof to be made in said judgment docket of said Circuit Court."

The defendants' pleading further goes on to narrate the history of an attempted foreclosure of a mortgage in favor of the Wallowa Mercantile Company, antedating the supposed lien of the justice's judgment, and points out certain alleged defects in said foreclosure which they claim rendered the same void as to the answering defendants here. The prayer of the answer is that the suit be dismissed. The reply denies the allegations respecting the rendition of the judgment in the Justice's Court, avers in its own way the proceedings under the foreclosure already mentioned, and alleges other matters not necessary to be considered. From a decree substantially according to the prayer of the complaint the defendants appealed.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. Thomas M. Dill*.

For respondent there was a brief and an oral argument by *Mr. O. M. Corkins*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It is contended by the defendants that this is a suit to remove a cloud from the title of the plaintiff, and that the facts stated in the complaint are not sufficient to authorize the granting of such relief. They argue that it is incumbent upon the plaintiff in such a suit, not only to state the nature of the alleged cloud, but to show wherein the claim by virtue thereof is void.

Conceding this to be a correct statement of the rule, and applying it to the plaintiff's declaration, we find that the defendants have attempted to sell his land for the debt of another. Reduced to its lowest terms, this cannot be done lawfully, and the statement itself shows the reason why the resulting cloud would be null as a basis of title.

The plaintiff's allegation of ownership of the realty mentioned having been denied, it was incumbent upon him to prove the averment. We find exemplified in the record a homestead patent for the land from the United States to Alfred J. Carpenter, recorded June 29, 1901, a deed from Carpenter and wife to the Wallowa Mercantile Company on January 2, 1906, covering the same premises, a sheriff's deed purporting to be the result of a mortgage foreclosure conveying the land to the Wallowa Mercantile Company on January 21, 1908, and, lastly, a deed from the Wallowa Mercantile Company to the plaintiff, of date July 22, 1910, transferring to him the title to the realty in question. If nothing else were shown, these conveyances operate to vest the title in fee simple in the plaintiff, and constitute at least *prima facie* proof of the allegations of his complaint. It was incumbent upon the defendants, therefore, to establish their own case. In other words, they were compelled to prove the judgment of the Justice's Court upon which they rely as authority for their execution and sale of which plaintiff complains.

2, 3. It is said in Section 87, L. O. L.:

"In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be

controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction."

According to *Ashley v. Pick*, 53 Or. 410 (100 Pac. 1103), overruling earlier cases on the matter of pleading, we find that the answer of the defendant properly avers the rendition of the judgment in the Justice's Court when it states that the "judgment was duly given, made and entered." None of the decisions, however, dispense with the necessity of proving the facts conferring power on an inferior court when its determination is challenged. The authority of a Justice's Court is thus defined in Section 951, L. O. L.:

"A Justice's Court has jurisdiction, but not exclusive, of the following actions: (1) For the recovery of money or damages only, when the amount claimed does not exceed \$250; (2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed \$250; (3) for the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding \$250; (4) also, to give judgment without action, upon the confession of the defendant for any of the causes specified in this section, except for a penalty or forfeiture imposed by statute."

This excerpt is qualified by Section 952 in these words:

"The jurisdiction conferred by the last section does not extend, however, (1) to an action in which the title to real property shall come in question; (2) to an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction, or upon a promise to marry."

Other restrictions on actions to recover a penalty or forfeiture given by statute are prescribed by Sec-

tion 953. As said by Mr. Justice MOORE in *Ferguson v. Byers*, 40 Or. 468 (67 Pac. 1115, 69 Pac. 32):

“A court’s jurisdiction of the subject matter of an action is determined, in the first instance from an inspection of the allegations of a complaint.”

The only evidence offered by the defendants in support of their allegations of a duly given judgment of the Justice’s Court was the exemplification of the journal of that court, which is here set down:

“State of Oregon,
County of Wallowa—ss.:

“Proceedings in Justice Court, before J. F. Burleigh, Justice of the Peace. Action for recovery of money. Issued March 5, 1903. Returnable March 16, 1903. Returned March 12, 1903. James Haynes, Constable. Be it remembered, that on this 5th day of March, 1903, a verified complaint was filed in the above-entitled action by plaintiffs. A summons was issued made returnable on March 16, 1903, at 10 o’clock A. M., and placed in the hands of O. W. Pagin, constable, for service. March 12, 1903, summons was returned indorsed as follows: ‘State of Oregon, County of Wallowa—ss.: I hereby certify that I served the within summons within said county and state on the within named A. J. Carpenter on the 6th day of March, 1903, by delivering a copy thereon prepared and certified to by me as constable, together with a copy of the complaint prepared and certified to by J. F. Burleigh, Justice of the Peace, to A. J. Carpenter, personally. O. W. Pakin, Constable.’ March 16, 1903, 10 o’clock A. M. Now, at this time, which was the time set for the trial of the above-mentioned issue, plaintiff appeared by their attorney, T. D. Hitt, for trial. Defendant appeared not at all, and after waiting one full hour, and he still failing to appear or answer the complaint herein as by law required, his default is hereby entered. It is therefore hereby considered, ordered, and adjudged that plaintiffs have

and recover of and from the defendant the sum prayed for in the complaint, to wit, the sum of ninety-four and 60/100 dollars, and the further sum of ten dollars attorney's fees and the costs of this action to be taxed.

"J. F. BURLEIGH,
"Justice of the Peace."

No complaint or summons was offered in evidence, nor was there any attempt to give secondary evidence of the contents of such papers. The defendants relied solely on the journal entries above quoted. A casual reading of them reveals nothing whatever to show that the action was one over which the Justice's Court had jurisdiction. For aught that appears on the judgment-book of the justice, the action may have involved the title to real property or false imprisonment, libel, slander or malicious prosecution, all within the inhibition of Section 952, *supra*. The judgment of a Justice's Court is not in any sense of the word self-sustaining. The original documents upon which it proceeded must be put in evidence, or secondary evidence given thereof, in the cases prescribed by law, before its decisions can be sustained, when controverted. The showing of the defendants is fatally defective in this respect.

4. Further, conceding that the determination of the Justice's Court was regular in form and supported by jurisdiction over the subject matter, it remains to be seen whether by the subsequent proceedings it was properly made a lien upon the realty involved. It is said in Section 2442, L. O. L.:

"Whenever a judgment is given in a Justice's Court in favor of anyone for the sum of \$10 or more, exclusive of costs or disbursements, the party in whose favor the judgment is given may at any time thereafter, while such judgment is enforceable, file a certified transcript thereof with the county clerk of the

county wherein such judgment is given, and thereupon such clerk shall immediately docket the same in the judgment docket of the Circuit Court. * * ”

The section further prescribes that from the time of the docketing of the judgment in that manner it shall be a lien upon the real property of the defendant as though it were a judgment of the Circuit Court. It is required by Section 771, L. O. L., that whenever a copy of a writing is certified to be used as evidence the certificate shall state that the copy has been compared by the certifying officer with the original, and that it is a correct transcript therefrom and of the whole of such original, or of a specified part thereof. The certificate appended to the alleged judgment of the Justice's Court is in these words:

“State of Oregon,
County of Wallowa—ss.:

“I hereby certify that the foregoing is a full, true, and correct copy of my docket in the above-entitled action, and of the whole thereof.

“J. F. BURLEIGH,
“Justice of the Peace.”

It has been held in *Bloomfield v. Humason*, 11 Or. 229 (4 Pac. 332), and in *State v. McDonald*, 55 Or. 419 (103 Pac. 512, 104 Pac. 967, 106 Pac. 444), that this section does not apply to public records of other states or countries; but in the first of these cases Chief Justice WATSON uses this language:

“The respondents duly objected to the admission of the transcript as incompetent, and not properly certified. The certificate of the officer does not state that the copies composing this transcript, or any of them, have been compared by him with the originals, as required by * * the * * Code, and the respondents insist here that this alone is sufficient cause for

rejecting them as evidence. If the state law controlled, we could find no answer to this objection. The statute is clear and imperative upon this point. These copies are not authenticated in the mode prescribed by it, and the courts cannot dispense with its requirements. But the certificate does comply with the provisions of the federal law on the subject, and under that authority the evidence must be admitted."

In the instant case the matter introduced in evidence relates to a domestic judgment, and if it is to be given effect it must needs be identified as required by our statute on that subject. Because it fails to state that the certifying officer had compared the exemplification with the original, the certificate of authentication is of no effect and the transcript was not sufficient authority to the clerk of the Circuit Court to docket the judgment as a lien upon real property. The contention of the defendants is thus shown to be without foundation.

The plaintiff having made a *prima facie* case by the production of the deeds already mentioned, and defendants having failed to establish their contention by any competent evidence, it is unnecessary to consider the other questions suggested at the argument.

The decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

Denied June 22, 1915.

ON PETITION FOR REHEARING.

(148 Pac. 1121.)

In Banc. MR. JUSTICE BURNETT delivered the opinion of the court.

5. The petition for rehearing criticises the opinion of the court wherein it was held that the judgment of

the Justice's Court upon which the defendant relies was not self-sustaining. The deduction from the argument of the petition is that because Section 2417, L. O. L., provides: "Actions at law in Justices' Courts shall be commenced and prosecuted to final determination, and judgment enforced therein, in the manner provided in the Code of Civil Procedure for similar actions in courts of record, * * " the recitals of the justice's docket are entitled to the same force and credence as similar entries upon the journal of a Circuit Court, although not supported by any pleadings, summons or other *indicia* of jurisdiction. The fallacy of the argument lies in failing to distinguish between jurisdiction and procedure. The former is the authority to proceed at all. The latter is the formula by which jurisdiction is exercised.

It was never the intention of the legislature to exalt a Justice's Court from the grade of an inferior tribunal to the plane of general jurisdiction occupied by the Circuit Court under the Constitution as it existed when the justice's judgment in question was rendered. The fundamental law then thus declared: "The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, and County Courts, which shall be courts of record, having general jurisdiction to be defined, limited, and regulated by law, in accordance with this Constitution. Justices of the peace may also be invested with limited judicial powers * * ": Article VII, Section 1, of the Constitution. The Justices' Code does not change the nature of the constitutional rule that these courts are of limited jurisdiction, nor does it affect the principle established by a long course of decisions that their judgment must be

sustained affirmatively by positive proof that they had jurisdiction of the cases they attempt to decide.

If the argument of the petition proves anything, it proves too much, for if the recitals of the justice's docket are sufficient to establish its jurisdiction without anything further, the like rule should be applied to the decree of foreclosure in the Circuit Court under which the plaintiff claims. That decree foreclosed the superior mortgage as against the judgment upon which the defendants here assert the right to issue execution and sell the land. The court there affirmed its jurisdiction and, according to the contention of the defendants, that would be sufficient here as against any defect in the details of the publication of summons and the proof thereof, which being true, would be decisive against the defendants, for it is without dispute that the lien of that mortgage was superior to the defendants' judgment.

Again, the petition contends that the court was in error in deciding that the certificate of authentication to entitle the judgment of the Justice's Court to be docketed in the Circuit Court must show that the certifying officer has compared the copy with the original as required by Section 771, L. O. L. The contention is that it is enough that the transcript of the judgment should be "certified to be a true and correct transcript from the original entries by the justice," according to the wording of Section 2442, L. O. L. The two sections about the authentication of a public document are in *pari materia*, and must be construed together, making both effective if possible, because one does not purport to repeal the other. Under this rule it is necessary by Section 771, L. O. L., for the certifying officer to show that by actual comparison he is

qualified to say in his certificate the exemplification of the record is true and correct. We adhere to the former opinion.

FORMER DECISION APPROVED. REHEARING DENIED.

Argued May 7, affirmed June 22, 1915.

SCHOOL DISTRICT NO. 5 v. NEDER.*

(149 Pac. 535.)

Adverse Possession—"Color of Title"—What Constitutes.

1. Where a town site, as granted by the federal government, was larger than the town plat, so that there was a discrepancy between the description in deeds locating land with respect to the town site and those with respect to the plat, a deed conveying property with reference to the town site is color of title to land held by plaintiff in the platted portion.

[As to color of title sufficient to sustain adverse possession, see notes in 14 Am. Dec. 580; 88 Am. St. Rep. 701.]

Adverse Possession—Adverse Title—Sufficiency.

2. An actual adverse holding of land for 25 years ripens into title.

From Baker: GUSTAV ANDERSON, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by School District No. 5 of Baker County, Oregon, against J. H. Neder.

After stating the corporate entity of the plaintiff the complaint has this allegation:

"That at this time the plaintiff is in the sole, actual and exclusive possession of the following strip or tract of land, to wit: Commencing at a point on the south side line of Center Street, in the city and county of Baker, State of Oregon, according to the recorded official plat of said City of Baker in the office of the county clerk of said county, 344 feet west from the intersection of said side line with the west side line of Fourth

*As to color of title of land in case of overlapping grants, see note in 15 L. R. A. (N. S.) 1245.

Street in said city, thence running south at right angles with said south side line of said Center Street 162 feet; thence west 18.24 feet; thence north 162 feet to said south side line of said Center Street and perpendicular thereto, and thence east on said south side line of Center Street 18.24 feet to the place of beginning, and that plaintiff and its predecessors in interest have been in the sole, actual, exclusive, hostile, open, notorious and uninterrupted possession of the said premises under claim of right of ownership for more than 27 years last past."

Averring, in substance, that the defendant asserts some interest in the plot of ground described, which claim is without foundation or right, the plaintiff prays that it be decreed to be the owner in fee of the premises, that its title be quieted, and that the defendant be held to have no estate therein. The answer denies all the averments of the complaint except the defendant's claim to the ground and plaintiff's corporate character, and alleges fee-simple ownership and exclusive possession of the tract in defendant for more than 10 years last past. The reply traversed the allegations of the answer. The Circuit Court rendered a decree favorable to the plaintiff, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. A. A. Smith* and *Mr. John L. Rand*, with an oral argument by *Mr. Smith*.

For respondent there was a brief with an oral argument by *Mr. William Smith*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The general government formerly granted the southeast quarter of the southeast quarter of sec-

tion 17 in township 9 south, range 40 east of Willamette Meridian as the town site of Baker City, now the City of Baker, in the county of the same name in this state. The government title to the land lying west of this town site was acquired by J. M. Boyd. His first alienation was dated April 4, 1871, and conveyed to Baker City Academy a tract thus described:

“Commencing at the northwest corner of the town site of Baker City; thence due west five chains; thence due south eight chains; thence due east five chains; thence due north eight chains to the place of beginning containing four acres,”

—which is also designated in the deed as “situate in the southwest quarter of the southeast quarter” of section 17 above named. By regular mesne conveyances the plaintiff succeeded to this grant by that description. Boyd subsequently conveyed other lands lying immediately west of the plot sold to the academy by description “commencing at the northwest corner of the Baker City Academy Block.” Substantially this form of designation of the beginning point was used for subsequent deeds to land lying immediately west of the plaintiff’s holdings until the year 1904, when one of the defendant’s predecessors in title conveyed by warranty deed property in Baker City “commencing at a point on the south line of Center Street 362.24 feet west from the intersection of the south line of Center Street and the west line of Fourth Street,” and on the same date quitclaimed to the same grantee a tract bounded by beginning 344 feet west of the intersection of street lines already noted, and describing a strip 18.24 feet wide abutting upon the east boundary of the land included in the warranty deed. This strip is the subject of the present controversy.

It appears in evidence that in 1868 lots in blocks with streets and alleys were laid out by authority, on the government town site of Baker City. Beginning at the east side of the 40 acres granted for that purpose the plat of these municipal subdivisions shows from east to west:

Front Street	100 feet wide
Blocks 1, 8, 9, 16, with $16\frac{1}{2}$ feet alley in each and two lots 100 feet each 4 blocks $216\frac{1}{2}$ feet each.....	866 feet
First, Second, and Third Streets, 80 feet each	240 feet
Fourth Street	114 feet
<hr/>	
Total	1,320 feet

—or the half mile which would be the east and west dimension of the government town site if that subdivision were of exact standard size.

1, 2. The discrepancy leading to this controversy arises from the fact that the later conveyances of the defendant's predecessors in title start with reference to the west line, or otherwise the northwest corner of the town plat instead of the original town site granted by the United States. It is claimed by the plaintiff, and we think the testimony preponderates to show, that the legal subdivision constituting the town site contains more than 40 acres, making the west boundary thereof still farther west than the west line of the town plat. In other words, the plat did not cover all the town site as granted by the United States. Beginning, as it did, at the northwest corner of the government town site instead of the same corner of the subsequently laid out plat, the deed from Boyd to the academy gave color of title to the premises included in its description. We are convinced that the

preponderance of the testimony is to the effect that the plaintiff and its grantors have held actual adverse possession of the strip in dispute for more than a quarter of a century which, if nothing else were shown, would constitute a sufficient showing to sustain the decision of the Circuit Court.

The decree is affirmed.

AFFIRMED.

Submitted on briefs June 7, conditionally affirmed June 22, 1915.

HOUSMAN v. PETERSON.*

(149 Pac. 538.)

Assault and Battery—Trial—Instructions.

1. In an action for assault, where the court instructed that recovery for expenses incurred for medical services is known as compensatory damages, that, if the jury should find any sum expended by plaintiff for such attendance, he should be allowed the amount, and that there was no testimony, however, as to the amount of doctor's bills, and also charged that if a person wantonly assaults another without provocation the jury may allow punitive damages, and that if such is the case it is within the jury's discretion, in addition to compensatory damages for nursing and medical attendance, to allow damages by way of punishing defendant, a refusal to instruct that plaintiff could not recover for medical services because no evidence was offered as to the value thereof was erroneous, since the reiteration by the court of the statement that the jury might find in plaintiff's favor for medical service was likely to mislead the jury.

Assault and Battery—Provocation—Reduction of Compensatory Damages.

2. Provocation given the defendant by plaintiff leading to an assault and battery can mitigate only punitive damages, not those compensatory in their nature.

Appeal and Error—Harmless Error—Instructions.

3. In an action for assault, where the testimony and instructions showed that the jury clearly understood which of two assaults was relied upon for recovery, the refusal to instruct that a second assault could not be so relied upon was not prejudicial error.

*As to evidence of provocation to mitigate damages in civil action for assault, see notes in 1 L. R. A. (N. S.) 1137; 11 L. R. A. (N. S.) 670.
REPORTER.

Appeal and Error—Review—Amount of Damages—Remittitur.

4. A judgment for damages for assault and battery will not be reversed for an erroneous submission of expenses for medical treatment, where the amounts claimed were definite and could easily be eliminated from the recovery.

From Multnomah: GEORGE N. DAVIS, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by J. H. Housman against J. H. Peterson, for damages for personal injuries resulting from assault and battery.

The complaint charges, in substance, that on March 24, 1914, defendant, without cause or provocation, willfully and maliciously assaulted and beat the plaintiff; that the blows so received caused the blood to settle in and around plaintiff's eyes, and cut and wounded plaintiff's nose, causing a permanent scar thereon; that by reason thereof plaintiff suffered bodily pain, humiliation and distress to his damage in the sum of \$2,500. Then follows a claim for special damages for loss of time, medical attention and nursing, in the sum of \$75. Defendant's answer admits striking plaintiff in the face, but denies all the other allegations of the complaint. Then follow two affirmative defenses in the nature of counterclaims, but these were abandoned at the trial and no evidence offered in support thereof. From a verdict and judgment for plaintiff, defendant appeals.

Submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

CONDITIONALLY AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. P. P. Dabney* and *Messrs. Wood, Montague & Hunt*.

For respondent there was a brief presented over the name of *Messrs. Sears & Benedict*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. The first two assignments of error are based upon the refusal of the trial court to instruct the jury that plaintiff could not recover for medical services because no evidence was offered as to the value thereof. The instructions given upon this point were as follows:

“Those damages are known as compensatory damages, and if you find from the evidence that the plaintiff lost anything from his inability to carry on his usual work and employment, and if you find any sum or sums for medical attendance or nursing, allow him such an amount as you find from the evidence that he has expended. As I understand it, there was no testimony, however, as to his earning capacity, nor as to the amount of doctor’s bills. I will say that in conjunction with my other instruction.

“Now, it is also the law that, if a person wantonly and maliciously assaults another without provocation or cause, then it is within the province of the jury to allow the person assaulted what is known as punitive damages or smart-money. It is alleged in the complaint that this assault was malicious and vicious, and therefore, if you find such to be the fact, and it is within your discretion, you may allow the plaintiff, in addition to the compensatory damages, and the special damages indicated to you for nursing and medical attendance, you may allow him damages by way of punishment of this defendant. And that would be such a sum as you think under all the circumstances of the case should be levied against this defendant as a punishment for the assault committed upon the plaintiff, if you find that an assault was committed.”

There was as a matter of fact no evidence as to the reasonable or any value of the medical attendance. While in the first paragraph of the instructions above quoted the court called the attention of the jury to the absence of such evidence, nevertheless in the next paragraph the court reiterates the statement that the jury may find in plaintiff's favor for medical services. We think the jury might very easily have been misled by this statement and the instruction requested by plaintiff should have been given.

2. Defendant next contends that the court should, as requested, have given to the jury the following instruction:

"You are further instructed that the plaintiff has alleged in his complaint that the defendant assaulted and beat him without cause or provocation, which is denied by the defendant, though the defendant does admit that he struck the plaintiff. There is, however, certain evidence in this case to the effect that the defendant was provoked and incited to strike plaintiff by certain alleged conduct on the part of the plaintiff. If you find that the plaintiff did, prior to being thus struck, use the language ascribed to him, and did refuse to leave defendant's premises when requested so to do by defendant, and did contrary to his agreement release defendant's bulldog, and if you further find that such conduct did incite the defendant to strike the plaintiff, then you will bear the same in mind in assessing plaintiff's damages, and will make such allowance in favor of the defendant on account of such mitigating circumstances as may to you seem just and reasonable under all the circumstances of the case. In other words personal abuse of the defendant by plaintiff, which induced, or tended to induce, the assault, may be considered by you in mitigation of damages."

It will be noted that this instruction makes no distinction between compensatory and punitive damages.

There is some divergence of judicial expression as to whether or not provocation can be considered by a jury in mitigation of compensatory damages. However, we think that the weight of authority and the better reasoning support the doctrine announced in the cases of *Fenelon v. Butts*, 53 Wis. 344 (10 N. W. 501), and *Osler v. Walton*, 67 N. J. Law, 63 (50 Atl. 590), in the latter of which it is briefly stated thus:

“A provocation that will not justify an assault should not excuse making compensation for the injury inflicted. It is enough that it may save or reduce a penalty *quasi* criminal, which is the foundation of punitive damages.”

The instruction asked was therefore properly refused.

3. The next assignment presented by defendant is that the trial court erred in refusing to give the following instruction:

“I further instruct you that, under the pleadings in this case and the evidence adduced, plaintiff is not entitled to recover for any injuries suffered by him in the second assault mentioned in this case. Who was at fault in that encounter, and who may be entitled to recover for injuries then received, are questions not involved in this case. The sole purpose for which the evidence as to said second assault may be considered by you is in determining the extent of the injuries received by plaintiff in the first assault as distinguished from the second one. Whether or not defendant should compensate plaintiff for the injuries received in the second encounter, or whether the defendant instead should recover from the plaintiff for such injuries received in the second encounter, is not involved in this case, and is not for your determination.”

4. A careful reading of the testimony and the instructions as given show that the jury quite clearly

understood which assault was relied upon for a recovery, and that defendant was not substantially hurt by the refusal. For the refusal of the court to instruct the jury in regard to the matter of medical attendance, as requested, we should feel it necessary to reverse the case, but for the fact that this item is practically segregated by plaintiff's complaint.

And therefore, following the precedent established in the case of *Tuohy v. Columbia Steel Co.*, 61 Or. 532 (122 Pac. 36), it is ordered that if within 10 days plaintiff will remit the amount claimed for special damages, amounting to \$75, the judgment will be affirmed as to the residue; if he fails to do this, the judgment will be reversed.

CONDITIONALLY AFFIRMED.

Argued May 28, reversed and dismissed June 22, 1915.

BLACK v. IRVIN.*

(149 Pac. 540.)

Exchange of Property—Rescission—Burden of Proof.

1. Plaintiff, who alleged that defendant made misrepresentations in effecting an exchange of property, has the burden of proof.

[As to difference between exchange of property and sale, see note in 94 Am. St. Rep. 227.]

Exchange of Property—Misrepresentations—Right to Rely on.

2. A statement that a restaurant, for which plaintiff was induced to exchange his farm, was a good place and profitable, is not a statement of a positive fact on which plaintiff was entitled to rely.

Fraud—Presumptions.

3. Fraud cannot be presumed, but must be alleged and established by the greater weight of the evidence.

*As to whether statement of opinion, such as puffing and trade talks, etc., is fraud, see note in 35 L. R. A. 417. REPORTER.

Exchange of Property—Fraud—Misrepresentations.

4. In exchange of property, statements which are mere boosting or puffing cannot be the basis of an action for fraud or rescission.

[As to liability of vendor of realty for false representations innocently made, see note in Ann. Cas. 1913C, 63.]

From Marion: WILLIAM GALLOWAY, Judge.

. Department 2. Statement by MR. JUSTICE BURNETT.

This is a suit by William Black and wife against William A. Irvin to rescind a sale upon the ground of fraud. The transaction consisted of an exchange of a farm owned by plaintiffs, William Black and Dora Black, his wife, located about six miles from Silverton, in Marion County, Oregon, for a restaurant and lodging-house, known as the Elite Café, owned by defendant William A. Irvin, situated in the City of Salem. The complaint alleges, in substance, that the negotiations for the exchange commenced about December 24, 1913; that "for the purpose of inducing said plaintiffs to purchase said restaurant, lunch-counter, and rooming-house and to convey said above-described real premises to him, for the purpose of cheating, wronging and defrauding said plaintiffs, said defendant knowingly, falsely and fraudulently stated and represented to said plaintiffs that the expenses of operating said restaurant per day were not greater than \$30, and that the receipts from said lodging-house, lunch-counter and said restaurant were and had been during the last year averaging better than \$3,500 per month, and, for the purpose of convincing said plaintiffs of the truth of said statements, falsely and fraudulently exhibited certain false and fraudulent papers, representing them to be the cash receipts, as shown from the cash register, verifying said statement aforesaid"; that the business "was a good money-maker and on a good paying basis"; that plaintiffs

having no other knowledge or means of knowledge as to the truth of the statements, and, believing them to be true, executed and delivered to the defendant a warranty deed to their 104-acre farm, receiving a bill of sale of the restaurant, lunch-counter, and rooming-house, and entering into possession thereof on January 1, 1914. They allege that the above representations were false and known to be so by the defendant at the time; that they discovered the falsity thereof on January 9, 1914. According to their allegations, the business was not, and had not been for a long time past, taking in enough money to pay the running expenses. They notified the defendant that they rescinded the sale and tendered to him the restaurant and equipment, demanding a reconveyance of the land. They assert that the land was valued at \$7,500, and that the restaurant and lodging-house property was of no greater value than \$1,810.25.

By his answer defendant denies any fraudulent representations, and alleges that plaintiffs relied upon their own knowledge and information concerning his property and business, as well as that derived from third parties.

The reply put in issue the new matter of the answer. The Circuit Court heard the evidence, found that the land conveyed was of the value of \$7,000, the restaurant property \$2,000, and that defendant falsely represented the value of the restaurant, and that the same was a good money-maker and upon a paying basis, all of which plaintiffs believed. It rendered a decree in favor of plaintiffs annulling the contract. From this decree the defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief with oral arguments by *Mr. John A. Carson* and *Mr. Thomas Brown*.

For respondents there was a brief over the names of *Mr. Frank Holmes*, *Mr. John H. McNary*, *Messrs. Smith & Shields* and *Mr. M. W. Hunt*, with oral arguments by *Mr. Holmes* and *Mr. McNary*.

MR. JUSTICE BEAN delivered the opinion of the court.

It appears that Irvin bought the property at a bankrupt sale about five years before the trade and built up a paying business, putting a large part of what he received into improvements, among which were an ice and cold storage plant and a lighting plant costing about \$2,000. A short time after the exchange of the properties, the plaintiffs, being dissatisfied, obtained from dealers in second-hand goods a "rough" estimate of the value of the restaurant and lodging-house property, which valuation was placed at about \$2,100. It may be considered that this was probably a very low figure, about one half the value of the properties compared with what they were worth while the café and house were a going concern. We may also concede that the plaintiffs paid a high price for them in the exchange.

It should be noted at the outset that the representations made by the defendant as to the volume of business transacted by him in the café and lodging-house pertained to the past, and that there was no warranty nor representation as to what the future earnings of the establishment would be. The evidence fails to substantiate the allegations of the complaint as to the fraudulent representations made by the defendant. There are over 450 pages of typewritten testimony in the record, much of which is devoted to describing the

paraphernalia of the restaurant and lodging-house and detailing the imperfections in the crockery, silver plate, cooking utensils, furniture, bedding, etc. This testimony could have been obtained before the exchange of the properties as well as afterward. Black examined the café and lodging-house and visited the place three or four times, remaining there nights. He evidently had a full and fair opportunity to discover the defects which he now details and attempts to describe by volumes of testimony. He failed to have his wife make an inspection of the property, and was content to rely upon his own judgment. He apparently considered that he could conduct the business as successfully as the former owner, having had experience in that line. His attempt to do so has a bearing on the case. We mention briefly that he made a test for nine days, before complaining, and conducted the restaurant until about February 1st, when, after advertising for the patronage of theater parties, he closed the same at 8 o'clock P. M. Formerly it had been open during the night. After conducting the concern until February 10th, he closed the same and notified the defendant. There is no indication that, during the short time Black was making a test of the business, any considerable new trade was attracted. It seems that, on account of a rise in the price of food and not very sumptuous repasts being served, some of the regular customers ceased to patronize the café. It was soon after the holiday season, and general business appears to have been quiet. It may well be questioned whether Black gave the business a fair trial under the transformed conditions. The capital city had recently, on November 30, 1913, inaugurated a no-saloon policy. The cafe had been located next to a beer saloon, and,

being closely connected therewith, had served liquors with meals to those who desired. During the city campaign some prejudices were accentuated, and the café seemed to lose the "wet" trade without immediately picking up much "dry" patronage. So much for the history of the conditions.

1-4. On December 15, 1913, Black wrote to a real estate firm in Salem, giving a description of his farm, and stating that he would take a good restaurant in part payment, saying:

"I am familiar with the restaurant business, and there is nobody can hand me anything on a restaurant or hotel deal, * * because I have had a lifetime at the business."

This is not noted as an excuse for any fraud on the part of the vendor but as tending to indicate that the parties were "dealing at arm's-length." The main thing that Black required of Irvin during the negotiations was a statement of what the volume of his business had been during the past year. This Irvin furnished him, and this he alleges to be false. The laboring oar is upon plaintiff to prove the incorrectness of the statement. In this respect he has failed. On the other hand, the evidence of the defendant fairly shows that the receipts of the concern during 1913 were as represented. Irvin did not keep a complete set of account-books, but made a showing before the deal as to the receipts of the business for the year 1913, of the following figures, which were taken from the cash register slips: January, \$4,005.45; February, \$3,621.25; March, \$3,129.80; April, \$2,962.35; May, \$3,105.69; June, \$2,984.20; July, \$3,491.55; August, \$3,287.25; September, \$5,055.10; October, \$5,571.75; November, \$3,018.10; December to 25, \$2,213.80.

These figures Irvin swears correctly represented the monthly cash receipts for 1913, and his evidence is not successfully refuted. To prove that this statement was fraudulent, plaintiff Black introduced evidence tending to show that, during the first month of his administration of affairs, the income was less than as represented by defendant, and produced the testimony of several of the waitresses, waiters, cooks and of the cash register girl to the effect that in their judgment the receipts were as large as when Irvin was in charge. This was an unsatisfactory estimate. The evidence tends to show that there was a decrease in the volume of business beginning in December; that it fell off 8 or 10 per cent after the city went "dry." The figures that Irvin furnished to the plaintiffs show a decrease in the month of December, and Black had an opportunity to observe the same. As stated, there is no allegation in the complaint that defendant represented that the earning capacity of the place would be any certain amount in the future. Even if this could be considered material, see *Markel v. Moudy*, 11 Neb. 213 (7 N. W. 853). Black, having had some experience in the hotel business at different times in small cities, was evidently willing to take his chances as to the business in the future. His figures of the income for the time he conducted the establishment are as follows: Cash receipts for January, \$1,784.85; expenses, \$2-137.09; first ten days in February, cash receipts, \$443.50; expenses, \$556.21. The decrease in the volume of trade during Black's administration does not prove that the receipts of the business during the year were not as asserted by Irvin. It is in evidence that one man may make a success of the restaurant business while another a complete failure. That the place

was a "money-maker" during the time Irvin managed it was fairly shown by the evidence. This, however, is a general statement which was added to Irvin's written showing by a real estate dealer, who acted between the parties in negotiating the transfer, and it amounts to no more than "boosting a trade" or saying it was a good place. Referring to this statement in his evidence, Black says, "We were going a good deal on that." It was not a statement of a positive fact upon which Black had a right to rely: *Fellows v. Evans*, 33 Or. 30 (53 Pac. 491). There was no attempt, on the part of plaintiffs, to directly prove the falsity of Irvin's statement as to the cash receipts. Some of the employees merely stated opinions, and they did not agree in their conclusions.

Fraud cannot be presumed. It must be alleged and established by the greater weight of the evidence: *Keel v. Levy*, 19 Or. 450 (24 Pac. 253); *Scott v. White*, 50 Or. 111 (91 Pac. 487); *Allison v. Ward*, 63 Mich. 128, (29 N. W. 528). A list of the goods was made, and Black had an opportunity, before the deal, to obtain information in regard to their value. He was in a better position to do this before the deal than were the courts afterward. In *Scott v. Walton*, 32 Or. 460, at 461 and 462 (52 Pac. 180, at 181), former Mr. Justice BEAN states the well-known rule as follows:

"The evidence shows that the negotiations between the parties for the exchange continued some 10 or 15 days before the trade was finally consummated; that plaintiff resides near Lebanon and was acquainted with the property defendant was offering to trade to him, and that he not only had a full opportunity to, but did actually, examine it before making the exchange. Under such circumstances, the mere statement of the defendant as to its value furnishes no ground for avoiding the contract. The law recognizes

the well-known fact that it is characteristic of human nature for the owner, when about to sell his property, to set a high value thereon for the purpose of enhancing it in the buyer's estimation; and hence, when the parties are dealing at arm's-length, it does not help a purchaser who accepts and relies upon the vendor's statements as to value, when no warranty is intended and when the language used is not an affirmation of some specific fact, but the mere expression of opinion."

See, also, *Collins v. Jackson*, 54 Mich. 186 (19 N. W. 947).

It is stated in 14 Am. & Eng. Ency. of Law (2 ed.), page 118:

"The doctrine is that, when persons are dealing at arm's-length and on equal terms, mere commendatory expressions as to value, quality, prospects and the like, though exaggerated, cannot be made the basis of a charge of fraud, if there is no representation or concealment of any material fact, and nothing is said or done to prevent the other party from making an examination or investigation for himself."

The true rule is that a fraudulent misrepresentation cannot itself be the mere expression of an opinion of the person making it. While the vendee has a right to rely on an assertion of fact, he has no right to rely upon the mere expression of an opinion by the vendor in whatever language such expression is made. He is assumed to be as equally able to form his own opinion and come to a correct judgment in respect to the matter as the vendor, and cannot justly claim to have been misled by the opinion, however erroneous it may have been. For this reason the general praise of one's own property by a seller, commonly called "puffing," for the purpose of enhancing it in the buyer's estimation, is always allowed, provided it is kept within reasonable limits, is not a positive affirmation

of a specific fact affecting the quality, so as to be an express warranty, and not the intentional assertion of a specific and material fact known to the party to be false, so as to be a fraudulent misrepresentation: 2 Pomeroy, Eq. Juris. (3 ed.), § 878.

Sherman v. Glick, 71 Or. 451 (142 Pac. 606), relied upon by plaintiffs, is a case where defendant grossly misrepresented the value of a house and lot to an old lady, poorly educated, and unacquainted with the property and with business, and overreached her to the amount of \$1,750. This was held to be a constructive fraud. The case is not in point.

Applying the rules above stated to the issues and evidence in the case at bar, it follows that the decree of the lower court should be reversed and the suit dismissed; and it is so ordered.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MOORE did not sit in this case, and took no part in the consideration.

MR. JUSTICE BURNETT, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

Argued June 1, affirmed June 22, 1915.

MILWAUKEE MECHANICS' INS. CO. v.
RAMSEY.

(149 Pac. 542.)

Insurance—Fire Insurance—Subrogation of Insurer.

1. Where a mortgagee insures the hypothecated property at his own expense, the insurer, paying a loss by fire to such mortgagee to the amount of the debt, is subrogated to the mortgagee's right in such debt, since the insurance contracted and paid for by the mortgagee in effect makes the insurance company a surety to the holder of the mortgage for the payment of the debt.

Insurance—Fire Insurance—Subrogation of Insurer.

2. Where insured property is burned by the tortious act of one not a party to the contract, the insurer paying the loss, is subrogated *pro tanto* to the chose in action the payee has against the tortfeasor by reason of his insurable interest.

Insurance—Fire Insurance—Subrogation of Insurer.

3. Realty was insured against fire, the loss being payable to a mortgagee as its interest might appear; otherwise to the insured. Within the term of the policy the property was destroyed by fire, and upon the mortgagee and owner suing the insurance company the mortgagee recovered judgment for the amount of its secured debt, while the owner failed to recover because he had contracted to sell, violating a policy restriction. The insurance company paid the mortgagee's judgment, and demanded that the mortgagee assign to it the owner's note and mortgage, which was refused. Thereupon the company sued the mortgagee and the owner, claiming subrogation to the rights of the mortgagee against the owner, and seeking to foreclose the security and recover the amount of the debt. *Held*, that the insurance company could not recover, since by the policy it agreed with the owner to pay a certain designated person, the mortgagee, in case of a loss, but did not agree to pay the owner's debt to the mortgagee as such.

[As to insurer's right to subrogation, see note in 44 Am. St. Rep. 732.]

From Tillamook: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by the Milwaukee Mechanics' Insurance Company, a corporation, against A. Ramsey, E. U. Wagy, Tillamook County Bank, a corporation, and Tillamook City, a municipal corporation.

The plaintiff, a Wisconsin company engaged in the business of insurance against loss by fire in this state, insured the laundry of the defendant Ramsey in the sum of \$2,000, making the loss payable to the Tillamook County Bank, mortgagee, as its interest might appear; otherwise to the insured. The policy contained the usual restrictions rendering it void if the interests of the insured should be other than unconditional and sole ownership, if the subject of insurance were a building upon ground not owned by the insured in fee simple, if any change, other than by the death

of the insured, should take place in the interest, title or possession of the subject of insurance, or if other insurance, whether valid or not, should be effected upon the property without the consent of the company. This insurance was in consideration of a premium of \$60 paid by Ramsey, and the policy was executed and delivered to him. Afterward, during its period, not being so permitted by the company, Ramsey entered into an agreement in writing with Bailey and Wagy, defendants, whereby he agreed to and did sell to them, and they agreed to purchase from him, all the property described in the policy, together with the land upon which it was situated; they paying \$1,000 on account, assuming the mortgage to the bank, and agreeing to pay an additional balance of purchase money. They also subsequently insured the property without the consent of the company. It was provided in the policy issued to Ramsey:

“That if with the consent of the company any interest under the policy shall exist in favor of a mortgagee, * * the conditions of said policy shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached to, or appended to the policy.”

But there was no such stipulation attached to that instrument. During the term mentioned in the policy the insured property was destroyed by fire, entailing a loss in excess of the amount of insurance. It is disclosed that afterward Ramsey and the Tillamook County Bank, mortgagee, instituted an action against the company to recover the insurance, in which litigation Ramsey failed, and the bank obtained judgment for the amount of its secured debt. The company paid this judgment, and demanded that the bank assign to it the note and mortgage of Ramsey, which was

refused. As a consequence the plaintiff brings this suit, claiming that it is entitled to be subrogated to the rights of the bank under the note and mortgage against Ramsey, and seeks to foreclose the security and recover the amount of the debt. A general demurrer to the complaint was sustained by the Circuit Court, and, as plaintiff refused to plead further, a decree was entered dismissing the suit at its cost, and it appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. J. C. Veazie*.

For respondents there was a brief over the names of *Mr. H. T. Botts* and *Mr. Sidney S. Johnson*, with an oral argument by *Mr. Botts*.

MR. JUSTICE BURNETT delivered the opinion of the court.

We note at the outset that the insurance was effected by the mortgagor at his own expense under the policy, in which he is designated as the insured, and which insures his property, and appoints the mortgagee as the one to receive payments of the loss to the extent of its interest; otherwise, it is to be paid to Ramsey.

1. It is well settled that if a mortgagee, having, as he does, an interest in preserving the property pledged to him as security, insures the same at his own expense, and a loss by fire occurs, the insurer, paying the loss to the insured mortgagee to the amount of the debt, is subrogated to the means of enforcing payment of the original obligation by the debtor. In such instances the claim is not extinguished until payment by the one primarily liable. All that has happened in

that respect, is a change of creditors. The reason is that the insurance contracted and paid for by the mortgagee has the effect of making the insurance company a surety to the holder of the mortgage for the payment of the debt. Having liquidated the same, the insurer is subrogated to the rights of the one to whom payment is made, which is the same as though he had signed as surety and paid the promissory note, for the debt is really what is insured in such cases. In very truth the mortgagee has nothing else to insure, and when the debt is paid his policy lapses. The transaction is an instance of a contract directly between the mortgagee and the insurer, and is worked out like any other surety stipulation, with the resulting subrogation.

2. Again, if insured property is burned by the tortious act of one not a party to the policy, the insurance company, paying the loss to anyone to whom by the terms of the policy payment must be made, is subrogated *pro tanto* to the chose in action the payee has against the tort-feasor. The reason in such a case is that, but for the wrong resulting in destruction of the property, no liability would have accrued against the insurance company; but as it has neither privity of estate or contract with the incendiary, and is nevertheless compelled by the policy to pay for the result of the tort, its reimbursement is accomplished by subrogation.

3. The transaction described in the complaint, of which a *résumé* has been given, does not fall within either of these classes. We read in the complaint that the company is empowered to engage in the business of insurance against loss by fire. The policy which appears in the record insures Ramsey, not the plaintiff, against "all direct loss or damage by fire, except as otherwise

provided," upon the building and contents described in the instrument. By it the company agrees with Ramsey, and not with another, to pay a certain designated person in case of a loss. It does not agree to pay Ramsey's debt. The application to his obligation of the proceeds of the insurance in case of loss is a matter between Ramsey and the bank. What became of the money is no concern of the plaintiff after it paid the bank. It did not insure the debt. It insured the building. If Ramsey had burned the house, the mortgagee would have had an action against him for the tort, in that he damaged it by depreciating the value of the mortgaged property. Because such burning would have resulted in the company being compelled to pay the loss, it would have been entitled to subrogation to the rights of the bank to recover damages from Ramsey under the second illustration given at the outset. It is not charged in the complaint that Ramsey was in any way to blame for the fire. He incurred no liability on that account to the company or to the bank. The plaintiff did not pay Ramsey's debt, and hence has no privity with that obligation entitling it to subrogation. As Ramsey did not burn the building, there is no transaction of his which entails liability upon the company, either directly or indirectly, and which would give rise to the privity entitling it to subrogation. If there is to be any subrogation, it must be for the reason that the mortgagee has some hold upon the mortgagor to make him perform the duty which the plaintiff was compelled to discharge. The latter was obligated to pay for the fire, but Ramsey was not. Having no power to make Ramsey reimburse it for the burning, the bank could not impart any such authority to the plaintiff by subrogation:

Fire Assn. v. Patton, 15 N. M. 304 (107 Pac. 679, 27 L. R. A. (N. S.) 420).

In brief, for a consideration, the company agreed with Ramsey to pay a loss, and not a mortgage to the bank. We cannot import into the contract a stipulation to the effect that Ramsey should not only pay the premium, but also reimburse the company for the loss. It is not the intention of the parties that Ramsey should thus carry all the risk, besides paying the premium. The plaintiff was paid for assuming the risk, and has only complied with its contract by payment of the loss. It is not entitled to anything beyond its stipulation. We have examined all the authorities cited by the plaintiff to sustain the postulate that where the policy has become void as to the interests of the mortgagor, but remains in force as a protection to the mortgagee alone, the insurer, upon paying the mortgage, is entitled to subrogation. Without exception the adjudicated cases noted in the plaintiff's brief rest upon a separate contract between the mortgagee and the insurer, or the insurance was paid for by the mortgagee, or the policy was assigned to him, and hence became his property the same as though originally made to him. In *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 495, 502 (10 L. Ed. 1044), cited by plaintiff, Mr. Justice STORY says:

"If, then, a mortgagor procures a policy on the property against fire, and he afterward assigns the policy to the mortgagee * * as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due, in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account."

There are respectable precedents holding that the stipulation must be indorsed upon or appended to the policy, stating the manner in which the conditions of the instrument will apply to a mortgagee to whom loss is payable, if his right to receive payment is to be in any wise limited by the restrictions imposed upon the insured: *Boyd v. Thuringia Ins. Co.*, 25 Wash 447. (65 Pac. 785, 55 L. R. A. 165). This seems to be the theory upon which the bank recovered, and Ramsey did not, in their joint action upon the policy. Under this construction of the insurance agreement the company contracted with Ramsey to pay the bank in case of loss as its interest might appear absolutely and without reference to its violation of other terms of the policy. Hence in paying the loss to the bank the company was fulfilling its stipulation with Ramsey. It was complying with that part of its engagement with him which remained impossible of rescission, although he violated other portions thereof already mentioned. The company is before us contending that it has a right to enforce subrogation against Ramsey as an incident of a contract with him under which it says he has no rights. It maintains it was compelled to pay because of the terms of the policy. That feature, however, was a condition favorable to Ramsey, which was not affected by his selling the property. That much of the benefit for which he contracted remained unimpaired. The fallacy of the plaintiff's argument consists in assuming that Ramsey forfeited all his rights, when in truth there remained the one compelling the plaintiff to pay the bank in case of loss.

This action proceeds on the hypothesis that the plaintiff was obliged to pay; but, even so, it was because of its covenant with Ramsey for which he had paid a

premium of \$60. The payment of the loss was a compliance with the company's engagement to Ramsey, with whom it contracted, but for which no liability of the company would have accrued. The result is not different as to Ramsey's liability in this action, if his sale of the property worked an utter avoidance of the policy in all its terms. There are cases giving such construction to similar policies on the ground that, as the mortgagee must claim under a contract made for his benefit, he cannot occupy a better position than the one who made the contract; that the creditor must take the insurance agreement with its burdens, as well as with its benefits; and that if the maker of the contract, the mortgagor, cannot recover directly, neither can one who claims under him: *Delaware Ins. Co. v. Greer*, 120 Fed. 916 (57 C. C. A. 188, 61 L. R. A. 137); *Brecht v. Law Union & Crown Ins. Co.*, 160 Fed. 399 (87 C. C. A. 351, 18 L. R. A. (N. S.) 197), and note. However this may be, yet if such a meaning should be given to the policy, the company, being exonerated from payment by Ramsey's breach of the contract, was not bound to pay anything, so that its disbursement was voluntary, and not recoverable.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE McBRIDE
concur.

MR. JUSTICE BEAN concurs in the result.

Motion to dismiss appeal denied September 29, 1914.
Argued on the merits June 22, reversed June 29, 1915.

VINCENT v. FIRST NAT. BANK.*

(143 Pac. 1100; 149 Pac. 938.)

Appeal and Error—Record—Time for Filing—Evidence.

1. Under Laws of 1913, page 619, providing that the trial court or the judge thereof, or the Supreme Court or a justice thereof, may enlarge the time for filing the abstract, but that the order shall be made within the time allowed to file the transcript, an order extending the time for filing the transcript may be entered before the undertaking on appeal has been filed.

Time—Computation—Days.

2. Where a notice of appeal was served and filed on June 22d, an undertaking served and filed July 3d was in time; June 23d being excluded in computing the 10 days allowed.

Time—Computation—Days.

3. Where the transcript was filed August 19th an abstract filed September 9th was in time.

Appeal and Error—Record—Transcript—Sufficiency.

4. Under Laws of 1913, page 656, providing that when an appeal is perfected the original proceedings and original bill of exceptions shall be sent to the clerk of the Supreme Court, a transcript, including the original bill of exceptions but omitting certain motions, summons and other papers, is sufficient; the respondent being entitled to have the remaining papers brought up if desired.

ON THE MERITS.

Mortgages—Deed Absolute in Form.

5. A conveyance absolute on its face, but in fact intended to be security for the payment of a debt, did not convey title, but was only a mortgage which it was necessary to foreclose as provided by statute, before the grantor or mortgagor could be divested of his estate. The fact that it was agreed that the grantee should have the power to convey the premises and account for the proceeds did not change the character of the transaction.

[As to effect of lapse of time on right to have deed declared to be a mortgage, see note in Ann. Cas. 1914B, 354.]

Mortgages—Action for Accounting—Proof.

6. A complaint alleging that plaintiffs, being indebted to defendant, executed a warranty deed intended to secure the debt, that it was agreed that the grantee might convey the premises and account for the proceeds, and that the grantee negligently sold or exchanged

*On the question whether a deed absolute on its face but intended as a mortgage conveys the legal title, see note in 11 L. R. A. (N. S.) 209.

the premises for other property to plaintiff's damage in a certain sum, showed that the transaction was a mortgage, and that the mortgagee, having no title had attempted to alienate the estate of the mortgagor, and that the title of the mortgagor was in no way disturbed, and hence stated no cause of action.

From Yamhill: WEBSTER HOLMES, Judge.

In Banc. Statement PER CURIAM.

This is an action by Vinnie A. Vincent and Mary D. Vincent against the First Nat. Bank of Roseburg. From a judgment in favor of plaintiffs, defendant appeals. Respondent now moves to dismiss the appeal herein. The judgment in this case was entered May 14, 1914. The notice of appeal was served and filed on the 22d day of June. On the 1st day of July an order was made by the judge of the court below extending the time to file the transcript to August 25th. On the third day of July the undertaking was served and filed. The transcript was filed in this court August 19th and the abstract September 9th.

MOTION DENIED.

Mr. Walter C. Winslow and Mr. Roswell L. Conner,
for the motion.

Messrs. McCain, Vinton & Burdett and Mr. C. B. Chapin, contra.

In Banc. Opinion PER CURIAM.

1. The first ground of the motion is based upon the proposition that on the 1st day of July, when the order was made enlarging the time to file the transcript, the undertaking had not been filed and the appeal had not been perfected. The statute reads:

"The trial court or the judge thereof, or the Supreme Court or a justice thereof, may, upon such

terms as may be just, by order enlarge the time for filing the same [abstract]; but such order shall be made within the time allowed to file transcript, and shall not extend it beyond the term of the appellate court next following the appeal": Laws 1913, p. 619.

The contention made that this order can only be made after the appeal has been perfected and before the time to file the transcript has expired we think not sound. This construction is far too narrow. The context shows that it was meant that the order should be made before the time had expired to file the transcript, and not to restrict it to the time after the appeal had been perfected. We think this order was made within the proper time.

2. The second contention that the undertaking was not filed within the proper time is answered by decisions of this court in a number of cases, the last of which was *Pringle Falls Power Co. v. Patterson*, 65 Or. 476 (128 Pac. 820). The time within which an act must be done is computed by excluding the first day and including the last; and if we exclude the 23d, the undertaking was served and filed within 10 days.

3. The third contention that the abstract was not filed within the time is answered by the same computation.

4. The last contention that no transcript of the original proceedings has been filed is without merit. Laws of 1913, Chapter 335, provide:

"When an appeal is perfected the original pleadings and original bill of exceptions shall be sent by the clerk, or other proper officer of the trial court, to the clerk of the Supreme Court or appellate court."

The original bill of exceptions was filed with the transcript, and this is all that can possibly be of any benefit to any of the parties. To bring up all the mo-

tions, summons and other papers that are filed in the court below would simply entail a burden upon the court below, as well as upon the clerk of this court, and would serve no useful purpose. The pleadings are required to be copied in the abstract, and are so done in this case; and, if the clerk of the court below has not seen fit to send these original papers up, we cannot see that anybody is injured. If counsel for respondent desires them, he can have them sent here.

The motion to dismiss the appeal is denied.

MOTION DENIED.

Argued June 22, reversed June 29, 1915.

ON THE MERITS.

(149 Pac. 938.)

Department 1. Statement by MR. JUSTICE BURNETT.

The complaint here alleges, in substance, that the plaintiffs, being indebted to the defendant, made, executed and delivered to it an instrument which was in form a warranty deed conveying to the defendant certain lands in Clarke County, Washington, but that, in fact, the conveyance was intended by both parties to be a security for the liquidation of the indebtedness, which being accomplished, the title should be returned to the plaintiffs. It is also stated that it was "further understood and agreed at said time between the plaintiffs and defendant that said defendant should have the power to convey said premises and account to plaintiffs for the proceeds." It is charged that afterward the bank carelessly, negligently and without properly investigating the matter sold or traded the premises

for property located in Idaho, to the damage of the plaintiffs in the sum of \$4,300. A general demurrer to the complaint was overruled. The defendant answered, raising certain issues not necessary to consider at present, and a jury trial resulted in a judgment in favor of the plaintiffs for damages, from which the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. McCain, Vinton & Burdett* and *Mr. C. R. Chapin*, with oral arguments by *Mr. James McCain* and *Mr. J. E. Burdett*.

For respondents there was a brief with oral arguments by *Mr. Roswell L. Conner* and *Mr. Walter C. Winslow*.

MR. JUSTICE BURNETT delivered the opinion of the court.

5. The case made on the demurrer to the complaint is controlled by *Thompson v. Marshall*, 21 Or. 171 (27 Pac. 957), where it is established in an exhaustive opinion by Mr. Chief Justice STRAHAN that, although absolute on its face, a conveyance which is, in fact, intended to be a mortgage or security for the payment of indebtedness, does not operate to convey title, but is, in very truth, only a mortgage which it is necessary to foreclose in the manner provided by our statute before the grantor or mortgagor can be divested of his estate. In opposition to the demurrer the plaintiffs set much store by the allegation that it was understood and agreed the defendant should have power to convey the premises, and account to the plaintiffs for the proceeds. This allegation does not suffice to differentiate

this case from *Thompson v. Marshall*, 21 Or. 171 (27 Pac. 957). The same element appeared in the transactions there in question. Indeed, it is common practice to include in any mortgage of realty a power to sell the premises.

6. We have, then, in the instant case, according to the complaint, a situation where a mortgagee has attempted to alienate the estate of the mortgagor, but, having no title, the former effected nothing by such a transaction. Tried by the statement of the plaintiffs in their primary pleading, their title has not been in any wise disturbed. For all that appears on the face of the complaint, they might even yet bring suit to redeem the property or the defendant might sue to foreclose. Where the mortgage is in form an absolute deed, conveyance to an innocent purchaser would militate against the title of the mortgagor; but that element does not appear in this case. In brief, the plaintiffs rely for recovery upon an act of the defendant which by the showing made in the complaint did not affect their interests in the least. That pleading does not state a cause of action. Hence it is not necessary to consider the other errors assigned.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON CONCUR.

Argued June 7, affirmed June 29, 1915.

YOVOVICH v. FALLS CITY LUMBER CO.

(149 Pac. 941.)

Master and Servant—Employers' Liability Act—Scope.

1. The Employers' Liability Act (Laws 1911, page 16), Section 1, providing generally that all owners, contractors, subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution for the protection and safety of life and limb, includes hazardous occupations in general, not specifically enumerated in the first part of the section.

[As to what is "accident arising out of and in cause of employment" within Employers' Liability Act, see note in Ann. Cas. 1914D, 1284.]

Death—Employers' Liability Act—Recovery by Father.

2. Under Employers' Liability Act, Section 4, father of an employee killed in service, who left no widow, lineal heirs, adopted children, or mother, had right to maintain an action for the death.

Master and Servant—Employers' Liability Act—Hazardous Occupation—Question for Jury.

3. Whether the work conducted by an employer, in which an employee is killed or injured, involved a risk or danger to such employee, is a question of fact for the jury.

Master and Servant—Employment Within Employers' Liability Act—Lumbering—Question for Jury.

4. Whether deceased, killed by the springing up of a tree trunk which he had just cut through by direction of his foreman, was engaged in a hazardous employment, involving a risk and danger to the employee, within the Employers' Liability Act *held* for the jury, under the evidence.

Master and Servant—Employers' Liability Act—Negligence of Fellow-servant.

5. By direct provision of Employers' Liability Act, Section 5, where the deceased servant, in cutting through a tree, merely conformed to the directions of his superior, as was his duty, for the resulting injury the employer was liable, irrespective of any negligence on the part of such superior servant.

Master and Servant—Employers' Liability Act—Agent of Employer.

6. By direct provisions of Employers' Liability Act, Section 2, the foreman in charge of the lumbering operations, in which deceased servant was engaged at his death, was the agent of the lumber company.

Death—Employers' Liability Act—Death of Servant—Damages of Parent.

7. For the death of a servant, his father, suing under the Employers' Liability Act, was entitled to the amount which he might

have expected to come to him as the deceased heir, if the latter should die, to be calculated in view of the average earnings of the deceased, the prospective years he had to live, his industry, frugality and saving qualities, irrespective of the age of the father.

Death—Parent's Action for Death—Employers' Liability Act—Instruction.

8. In a father's action under the Employers' Liability Act against the employer of his son, killed in service, a charge that the jury should not take into consideration, in estimating damages, the wounds to the parent's feelings, nor give compensation for the pain and suffering inflicted upon him, but should estimate the financial loss suffered by the death, sufficiently instructed the jury that the damages were limited to compensatory damages.

From Multnomah: THOMAS J. CLEETON, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action to recover damages for the wrongful death of Stanko Yovovich, plaintiff's son, who received an injury while employed by the Falls City Lumber Company. The cause was tried to the court and jury, and a verdict rendered in favor of plaintiff for \$1,100. From a judgment entered thereon, the defendant appeals.

At the time of receiving the injury which produced his death, the decedent was employed by the defendant and working in its logging camp as a timber "bucker"; his duties being to saw fallen trees into logs. The evidence shows that the trees had been felled by timber fallers and marked by the "head buckler." As the work was usually conducted, the employees would fell the trees by sawing the same off about four feet above the surface of the ground, and the head buckler, who was foreman over the other employees, including the deceased, would then examine the trees felled and determine whether and how and where they should be sawed into sections, placing marks thereon, which constituted orders and directions to the buckers to saw the trees in two at such marks. The decedent had

nothing to do with felling the trees or placing the marks; his sole duty being to saw them where marked. It appears that a certain green and live hemlock tree was lying on the ground with a number of other trees which had been felled in the usual way. This particular tree, however, had not been cut-off at the butt by the timber fallers, which was unknown to the deceased, but known to the head buckler and timber fallers. It was either a windfall or had been knocked down by the falling of other trees against it. It was lying on the ground and bore the same appearance as the other trees which had been properly felled. Two other trees were lying across the top or upper part of this tree; their weight, until released, being sufficient to hold the hemlock in place on the ground. The foreman, without having the tree sawed off near the roots, as the others were, marked this tree for sawing in the same way as the other trees. One of these marks was placed at a point about 30 or 35 feet from the roots of the tree and below the two trees lying upon it. On May 17, 1913, decedent came to the tree in question, and in the course of his employment, according to his duty, proceeded to saw it in two at the mark placed thereon by the foreman below the other two trees. Just about as he had severed the tree and was working upon or about the same with his saw or ax, it flew back into an upright position, being released from the weight of its top and from the weight of the two trees upon it, and hurled the deceased through the air and upon the ground, injuring him so severely that he died as a result.

The action is brought under the Employers' Liability Act (General Laws of Oregon 1911, p. 16). It is alleged in the complaint that the work in which the

decedent was engaged, and which defendant was in charge of and responsible for, involved a risk and danger to the decedent and the other employees, and that the defendant failed to exercise that degree of care and precaution which the statute enjoins shall be used where work of such a hazardous nature is being prosecuted. The details of the negligence are set forth in the complaint as follows:

“That it was practical, without impairing the efficiency of the work or means of work then and there being pursued by the defendant, to have safeguarded, protected, and rendered safe the place where said Stanko Yovovich was so ordered to and did perform his duties by means of either one or all of the following devices, cares and precautions, to wit: (1) By properly felling the said live tree and by cutting the same at the butt, the same as the other trees in the vicinity were felled. (2) By sawing off said live tree close to the butt after the same was so pressed down by the other trees. (3) By inspecting the said live tree and ascertaining the fact that the same had not been felled, but was only pressed to the ground and liable to spring up when cut, and warning the buckers and Stanko Yovovich of that fact. (4) By refraining from placing a mark upon said live tree for the sawing of the same at any place. And this plaintiff alleges that the defendant did not use any of said devices, cares and precautions, but wholly failed and neglected to protect or safeguard said place where said Stanko Yovovich was required to work by any of said means, and that, had said defendant exercised such care and precautions, the death of Stanko Yovovich would not have occurred.”

The plaintiff further alleged that in ordering decedent to cut the live tree and in failing to furnish him with a safe place to work, the defendant was negligent in the particulars above enumerated. By its answer

the defendant admits the employment of the decedent and denies the allegations of negligence. It further alleges that, at the time of the accident complained of, Yovovich was engaged in cutting trees into sections; that, while cutting off one of the sections after the same had been completely severed, the stump of the remaining portion of the tree, being freed from the weight of the top, flew up, throwing the deceased, and causing the injury from which he died; that the tree upon which the decedent was working was what was known as a windfall, and that the decedent had been specially warned by defendant to look out for said tree and not get hurt; that Yovovich was guilty of negligence causing the accident in that he attempted to work about the tree contrary to the warnings, and unnecessarily stood thereon; that he assumed the risk.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett, Mr. F. C. Howell* and *Mr. A. L. Clark*, with an oral argument by *Mr. Howell*.

For respondent there was a brief by *Messrs. Malarkey, Seabrook & Dibble* and *Mr. George C. Johnson*, with oral arguments by *Mr. A. M. Dibble* and *Mr. Johnson*.

MR. JUSTICE BEAN delivered the opinion of the court.

It is contended by counsel for defendant that the evidence does not bring the action within the Employers' Liability Act. At the close of the evidence, they moved for a directed verdict in favor of the defendant company.

Isaac Barton, the defendant's foreman, describes the condition of the tree thus:

"The tree had just tipped over, and the roots stood not straight up and down, because the ground was a little bit sloping; and there was another tree laid across here. Now, as to whether that was a windfall (but I think it was), I don't remember just the fact of whether that was a windfall or not, but I think the upper one was a windfall, and the top of this tree laid up on that, so that it laid kind of with the hill. It couldn't lay flat, and, of course, when that was sawed off, it just simply tipped back, and left the tree—the root didn't stand up straight after it was tipped back. It stood a little that way (illustrating), because it couldn't go clear back after tipping out, hardly, because there would more or less dirt, you know, rattle off. Well, that held it just a little bit. It is pretty near straight, but not quite.

"Q. And how high did you say these roots stuck up in the air?

"A. About 30 feet, I should judge; that is, to the point of them—not the dirt, but the point of the roots. I should judge they stuck up 30 feet, because it was a hemlock, and tore up an awful pile of dirt."

Barton further testified in part:

"Well, I got this thick wedge and drove it in so I could slip his ax out, and after I got his ax out he started to walk down the tree; and I says, 'Stanko, you see this tree has got a root on it here, and she is'—

"Q. (Interrupting.) The tree has got what?

"A. A root on it; and I says, 'When it is sawed off, that is going to upset—fall back.' * * "

The testimony of Evan Yovovich, as interpreted, was in part as follows:

"A. He was right with him [decedent], only 20 feet distant from him—20 feet distant from where he was killed. * * He says he saw his cousin there sawing

the timber, there, kind of like that. There was two together—

“The Court: Laying side by side?

“A. Yes; and he sawed one off, and he went on the other, and he sawed over on this side, and cut the other side, and at that time he turned around. He was working, and don't know. It was when he heard something crack; then he turned his eye to him, and says he saw him and the ax flying in the air.”

It is urged by counsel for defendant that there is no evidence in the record showing that it was practicable to perform the work in a safer way than the means employed. Counsel candidly state in their brief that, had said fact been shown, the case might have been brought within the provisions of the Employers' Liability Act.

1-3. Section 1 of the act provides *inter alia* that generally all owners, contractors or subcontractors, and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection of life and limb. The application of this general clause of the statute is not a new question, and it is perhaps proper to state that the matter has been thoroughly considered by the court at different times. In *Dunn v. Orchard Land & Timber Co.*, 68 Or. 97, at page 101 (136 Pac. 872, at page 873), this court had before it the construction of Section 1, and, speaking through Mr. Justice BURNETT, said:

“The statute exerts its authority against ‘all owners * * or persons whatsoever engaged * * in the erection or operation of any machinery.’ It thus takes cognizance, not only of those who engage in building, but also those who operate machinery; and where it

declares that 'generally all owners, contractors or sub-contractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public,' it does not in good reason restrict the benefits and requirements of the law to particular persons mentioned in the beginning of the section, but rather enlarges and expands the scope of the act. The statute lays its commands, not only upon those engaged in building or in the transmission and use of electricity, but also upon those other persons included in larger category set out in the last clause of the first section."

It may also be stated that the general clause of the statute comprehends, within its provisions, acts of employers having charge of or responsible for work, involving a risk or danger to employees, usually termed hazardous occupations, which are not enumerated in the first part of the section: *Raiha v. Coos Bay Coal & Fuel Co.*, 77 Or. — (149 Pac. 940); *Schulte v. Pacific Paper Co.*, 67 Or. 334 (135 Pac. 527, 136 Pac. 5); *Wasiljeff v. Hawley Pulp & Paper Co.*, 68 Or. 487 (137 Pac. 755); *Heiser v. Shasta Water Co.*, 71 Or. 566 (143 Pac. 917); *Lang v. Camden Iron Works*, 77 Or. — (146 Pac. 964, 968). It appears that the decedent left no widow, lineal heirs, adopted children or mother; therefore, by Section 4 of the act, the father has the right to maintain the action: *McFarland v. Oregon Elec. R. Co.*, 70 Or. 27 (138 Pac. 458, 462). The question as to whether or not the work conducted by an employer involves a risk or danger to the employees is a proper one to be left to the jury as a question of fact: *Schaller v. Pacific Brick Co.*, 70 Or. 557 (139 Pac. 913, 915).

4-6. The main question is whether the evidence in this case brings it within the statute. The condition of the trees and the manner of conducting the work

were fully explained to the jury by the evidence, and it was for it to determine, under all the facts and circumstances, whether every practicable device and care was used by the defendant. To a jury exercising a common knowledge of the law of gravitation, and in the light of the experience of men of every-day affairs in regard to the work of cutting trees, the evidence tended to show that the defendant's foreman or head buckler neglected to use any device, care or precaution to keep the 30-foot stump in the position in which it ~~was~~ when the tree was marked and sawed, or to first cut the tree at the usual place near the roots. It is contended by counsel for defendant that the evidence does not show that the work could have been done in a safer way, and that, in order to bring the case within the scope of the statute, it was incumbent upon the plaintiff to produce such proof. This was plainly disclosed by the circumstances of the operations, if not by direct evidence. The deductions to be drawn from the facts and circumstances disclosed were a proper matter for the jury. It was not necessary for someone to act in the capacity of an expert and inform the jury what conclusion should have been drawn from the delineated facts and circumstances: *Myers v. Portland Ry., L. & P. Co.*, 68 Or. 599 (138 Pac. 213); *Pulsifer v. Berry*, 87 Me. 405 (32 Atl. 986). The evidence of Isaac Barton, foreman, that he warned the defendant to be careful and not get hurt, indicated that from his view there was special danger. The testimony in the case tended to show, and the jury could fairly have believed, that some precautions were necessary in marking the tree; that no experienced woodsman would have sawed the tree while in such

position, 30 or 35 feet from the roots, any more than an experienced axman would have cut a standing tree that distance from the ground, and that it was negligence of the architect of the work, the head buckler, to so direct the timber to be cut; that, according to common parlance, it was the preparation of a trap which would be sprung when the tree was cut and hurl the employee into the air, which by reasonable and practicable inspection and precaution could and should have been avoided; that the work was hazardous and involved a risk and danger to the employee. We hold that the case comes within the provisions of the statute, and that it was properly submitted to the jury. Witness Evan Yovovich stated that, when the tree was freed from the weight of the top, of course the roots and stump went back as nearly into place as the displaced earth would permit. Under Section 5 of the act, when the decedent conformed to the orders of his superior according to his duty, the resulting injury was not his fault. According to Section 2, the person in control of the work was the agent of the employer.

7, 8. Exceptions were taken to the instructions given to the jury upon the question of damages. The court instructed the jury in effect to take the average earnings of the deceased as a basis, with the prospective years that he would, in the course of nature, live, and determine from that how much he would save during that time which would go to his heir if he should die, informing them that it depends upon the industry, earning capacity, frugality, and saving qualities of the deceased; that it was not necessary for them to consider how old the father of the deceased was, but how much he lost by reason of the decedent's untimely death; that they should not take into consideration

the wounds to his feelings nor give compensation for the pain and suffering that might have been inflicted upon the relative, but estimate the financial loss suffered by the death. Counsel for defendant requested the court in effect to instruct the jury that the measure of damages was limited to compensatory damages or what damages would compensate plaintiff for his loss of the deceased. We think that the requested instruction was substantially covered by the charge given by the court, and that the instructions were in substance in accordance with the ruling in *McFarland v. Oregon Elec. R. Co.*, 70 Or. 27 (138 Pac. 458, 462), and *McClagherty v. Rogue River Elec. Co.*, 73 Or. 135 (140 Pac. 64). From the amount of the verdict in the case, it does not appear that the instructions of the court as to the measure of damages were prejudicial to the defendant.

Finding no error in the record, the judgment of the lower court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE HARRIS concur.

Argued June 22, affirmed June 29, 1915.

CASSITY v. WILSON.

(149 Pac. 1018.)

Appeal and Error—Presenting Questions in Lower Court—Necessity of Exceptions.

1. Where the bill of exceptions does not show that any exception was taken to any ruling at the trial or to the findings, the Supreme Court cannot consider the correctness of the ruling or the sufficiency of the evidence to sustain the finding.

[As to requirements of statement of reasons of appeal in equity case, see note in Ann. Cas. 1914D, 522.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action brought by F. A. Cassity against Ben H. Wilson, Ada S. Wilson and F. B. Stratton, alleging that defendants entered into a conspiracy to mislead and defraud him concerning certain patents and patent rights controlled by them, which they represented had been transferred to the Twin Manufacturing Company, a corporation. The complaint asserts that defendants falsely represented that if the plaintiff would so invest large profits would be made; that, to induce him to take a commission contract, the services of one J. H. Jefferson were secured to act as a partner with plaintiff, the defendants falsely pretending that said Jefferson would put a like sum into the business; that plaintiff, relying upon the representations thus made, did advance \$750 and gave his note for \$500, and Jefferson, at the instance of defendants and for the purpose of defrauding plaintiff, gave a check on the United States National Bank for \$750 and his note for \$500, which check was alleged to be worthless and known to be so by defendants at the time it was given. Plaintiff further avers that defendant Wilson, in pursuance of the conspiracy, agreed to go into partnership with him, and that he went north to Vancouver, B. C., and Seattle, at the behest of Wilson, to secure a location; that said Wilson did not carry out his agreement, and plaintiff was compelled to return to Portland with loss of much money and time. To this defendants Ada S. Wilson and F. D. Stratton file a general denial; and defendant Ben H. Wilson, in a further and separate answer,

alleges that the Twin Manufacturing Company is a corporation, that the contract was made with the corporation, that the money was paid to the corporation, and the officers of the corporation signed and put the seal of the corporation thereon. The case was tried before the court without a jury, and, from findings and judgment in favor of plaintiff, defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Leet & Mahone*, with an oral argument by *Mr. L. D. Mahone*.

For respondent there was a brief and an oral argument by *Mr. John Ditchburn*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. This case does not come here in a condition which enables us to consider the questions discussed in appellants' brief. The bill of exceptions does not show that any exception was taken to any ruling made by the court during the trial. It does show that many objections were made and overruled, but no exceptions to the rulings were saved in any instance. The findings of fact made by the court covered every issue made by the pleadings, and are sufficient to support the judgment, and were not excepted to upon the trial. Where a party wishes to raise in this court the question that a finding of the lower court is unsupported by evidence, his bill of exceptions should show that he excepted to the finding made and that he requested a different finding and excepted to the refusal of the court to make it: *Tatum v. Massie*, 29 Or. 140, 147 (44 Pac. 494), and cases there cited. The alleged bill of

exceptions here is not such in fact, as it fails to show that any ruling or finding of the court was excepted to; and, as before remarked, this court can only consider errors legally excepted to in the court below.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued May 7, reversed June 29, 1915.

MURRAY v. LA GRANDE.

(149 Pac. 1019.)

Municipal Corporations—Local Betterment Assessments—Compliance With Charter.

1. The imposition of a tax upon property by a municipality for a local improvement is a hostile proceeding, and before realty can be charged therewith the municipality must have complied with the provisions of its charter as to jurisdiction.

[As to purposes for which a municipality may levy assessments and taxes, see note in 16 Am. St. Rep. 365.]

Municipal Corporations—Local Betterment Assessments—Alternative Procedure.

2. The legislative power may provide one or more methods, concurrent or successive in operation, for the imposition of local benefit assessments to cover the cost of improvements in the future or already made, either of which methods the city may pursue.

Municipal Corporations—Local Betterment Assessments—Second Assessment—Legislative Power.

3. Although a local benefit assessment under existing laws may have been invalid for want of jurisdiction, the legislature, by subsequent enactment, may provide a new and independent procedure, ignoring even the question of jurisdiction under the former invalid assessment, to levy a tax, or provide for the same, to cover the cost of an actual improvement.

Municipal Corporations—Local Betterment Assessment—Failure to Give Jurisdictional Notice—Reassessment—Validity.

4. Where the charter of defendant city provided that, if any local betterment assessment was set aside by any court, the council might cause a new one to be made in like manner for the collection of the amount assessed, and where a street improvement assess-

ment was invalid, because the notice thereof to property owners, made a jurisdictional prerequisite by the charter, was defective, no subsequent reassessment of the cost of the improvement under the provision of the charter was valid, since the giving of notice in the terms described by the charter, the organic law under which the municipality operated, was a condition precedent to the city's securing jurisdiction to make an improvement, and to cure the invalidity in the proceedings it was necessary that they be had *de novo*, with valid notice, etc., to give jurisdiction.

From Union: JOHN W. KNOWLES, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by Jennie Murray, B. F. Webb, Francis J. Crawford, John C. McEwen, Charles Floberg, Oscar Thompson, Louis Strom, F. B. Tufverson and the La Grande Real Estate Association, a private corporation, against the City of La Grande, in Union County, Oregon, M. K. Hall, Mayor of said city, Lee Warnick, Recorder of said city, J. H. McLachlen, Chief of Police of said city, and the Common Council of said city, to permanently enjoin the collection of an assessment to cover the expense of making certain street improvements in the City of La Grande. The charter of that municipality treating of the manner in which such exactions shall be made and collected requires a preliminary report from three commissioners, to be appointed from the personnel of the city council, concerning the property involved and the benefits to be derived from the proposed improvement. This provision then appears in that instrument:

"After receiving said report the council shall, before the levy of any special assessment for any improvement give personal notice for ten days, or in the absence of any property owner, agent or person in charge of said property, by publication in a daily newspaper in said city for a period of ten days to either the owner, agent or person in charge of said property against which said assessment is to be made,

of its intention to levy said special assessments, naming the purposes for which special assessments are to be levied, a description of the improvements so proposed, the boundaries of the district to be affected or benefited by such improvement, the estimated cost of such improvements and designate a time when the council will meet and consider the proposed levy and the granting to any person feeling aggrieved, a hearing, before said council. After a compliance with this subdivision, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

After prescribing certain details about the manner of making the assessment, this clause follows:

"If any assessment is set aside by order of any court, the council may cause a new one to be made in like manner for the same purpose, for the collection of the amount so assessed."

After narrating the filing of the commissioners' report, it is charged in the complaint, and admitted by the defendants:

"That the report of said commissioners did not define or describe the boundaries of said assessment district, nor did the common council of the City of La Grande define or describe, by resolution or otherwise, the boundaries of the district to be benefited specially, or at all, by such improvements, at that time or at any other time at all; that upon receiving the report of said commission the council of said City of La Grande attempted to give personal notice for ten days to the owner or person in charge of the several lots and tracts of land claimed to be specially benefited or assessed for such improvement, and to absent owners by publication for ten days in the 'Evening Observer,' a daily newspaper published in said city; but that such notices so given or pretended to be given did not name the purpose for which said proposed special assessment was to be made, or a description of

the improvements proposed, or the boundaries of the district to be affected or benefited by such improvements, or the estimated cost of such improvements."

Based upon such a notice, the defects of which are conceded, the council proceeded to actually lay down a pavement of macadam on the street designated under a contract of date February 10, 1911. The plaintiffs charge various shortcomings of the contractor resulting, as they say, in a practically worthless pavement. The city was enjoined by the Circuit Court from collecting an assessment levied by an ordinance of October 4, 1911. By another ordinance of December 11, 1912, the municipality attempted to reassess the expense of the improvement upon the property of plaintiffs, but this in turn was enjoined by the Circuit Court. Professing to operate under the reassessment clause already quoted, the city again by an ordinance approved July 24, 1913, so far as it could lawfully do, made a renewed assessment for the same improvement, all after the pavement was actually laid. The Circuit Court heard the case on the pleadings and evidence and dismissed the suit; hence this appeal by the plaintiffs. REVERSED AND DECREE RENDERED.

For appellants there was a brief over the names of *Mr. Francis S. Ivanhoe* and *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Thomas H. Crawford*.

For respondent there was a brief with oral arguments by *Mr. James D. Slater* and *Mr. J. P. Rusk*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The vital question in this case is whether, under the charter and in the circumstances to which it is at-

tempted to apply its provisions mentioned, the city could make the reassessment in question. It is well settled that the imposition of a tax upon property by a municipality for a local improvement is a hostile proceeding, and, before realty can be charged with such an expense, the taxing body must have complied with the provisions of its fundamental law on the question of jurisdiction: *Strout v. City of Portland*, 26 Or. 294-299 (38 Pac. 126); *Smith v. Minto*, 30 Or. 351 (48 Pac. 166); *Bank of Columbia v. Portland*, 41 Or. 1-8 (67 Pac. 1112); *Oregon Transfer Co. v. Portland*, 47 Or. 1 (81 Pac. 575, 82 Pac. 16); *Applegate v. Portland*, 53 Or. 552-556 (99 Pac. 890); *Jones v. City of Salem*, 63 Or. 126-132 (123 Pac. 1096). If the city moves in such matters without first acquiring jurisdiction, it does so at its peril if nothing else is shown.

The *quasi* process in the present instance, by which alone the city could acquire jurisdiction, is the notice described in the quoted provisions of the charter. It is required, among other things, that there shall be contained therein a description of the improvement proposed, the boundaries of the district to be affected or benefited thereby, and the estimated cost thereof. This language plainly contemplates a work to be done, in the future. It has no reference to past improvements. It manifestly gives to the property holder who is to be assessed the right to be heard in advance, not only as to the amount of the levy, but also as to the kind of improvement. It is conceded by the answer that this was not done in the first instance. In respect to the final effort to tax the realty of the plaintiffs, the improvement had already been made, whatever its kind or nature; the question about the sort to be adopted had been irrevocably decided; the pave-

ment, whether good or bad, was in place—all without a previous opportunity for plaintiffs to be heard upon that subject. Confessedly, as disclosed by the answer, this charter right of the taxpayer was utterly ignored in the beginning for want of notice. That pleading expressly disavows any reliance upon the original proceedings, but claims under the ordinance of July 24, 1913, passed long after the work was done.

2-4. It is admittedly competent for the legislative power to provide one or more methods, concurrent or successive in their operation, for the purpose of collecting assessments designed to cover the cost of improvement yet to be made, or already made, either of which methods a municipality may pursue in the transaction of such affairs. It is also without question that, although operations under existing laws may have come to naught for want of jurisdiction, yet the legislative power by subsequent enactments may provide a new and independent formula ignoring even the question of jurisdiction under former proceedings, and yet levy a tax or provide for the same to cover the cost of an actual improvement. This is abundantly taught in such cases as *Thomas v. Portland*, 40 Or. 50 (66 Pac. 439); *Duniway v. Portland*, 47 Or. 103 (81 Pac. 945); *Hughes v. Portland*, 53 Or. 370 (100 Pac. 942); *Mills v. Charleton*, 29 Wis. 400 (9 Am. Rep. 578); *Schintgen v. La Crosse*, 117 Wis. 158 (94 N. W. 84); *Smith v. Detroit*, 120 Mich. 572 (79 N. W. 808). That, however, is not the situation in this instance. The language of the charter under which the defendants claim is this:

“If any assessment is set aside by order of any court, the council may cause a new one to be made in like manner for the same purpose for the collection of the amount so assessed.”

As previously pointed out, in proceedings of this character, the charter plainly contemplates street work yet to be done. It has no retroactive language. When the improvement is already made, it is impossible to make a reassessment "in like manner for the same purpose" as required by the charter. In other words, after the doing of the work, whether good, bad or indifferent, a situation is presented to which the present provisions of the La Grande charter cannot be applied. The giving of notice in the terms described by the excerpts of the organic law under which that municipality operates is a condition precedent which must be observed before the city can acquire jurisdiction to make an improvement. The contention of the defendants would make the acquisition of jurisdiction a condition subsequent. The plain logic of their position is that, notwithstanding the provisions of the charter, they may first decide and afterward hear. No independent or different proceeding is established by the charter for collecting such a tax. It simply provides for a reiteration of the same process, and does not dispense with any of the charter rights reserved to the property holder. The situation is simply one where the water of jurisdiction has run past the mill of opportunity. The time to have asserted the power to reassess was before the right of the taxpayer to be heard on the kind of improvement had been ignored and rendered worthless. If jurisdiction had been acquired regularly at the outset, it would have been permissible as the charter now stands to return and correct errors in the apportionment of the expense by a reassessment. In any case, if the city would retrace its steps for corrective purposes, it must go clear back to where it obtained jurisdiction, to

which alone can it tack renewed efforts to tax property. It would have been competent for the legislative power of the town to dispense with all previous notice of intention to install betterments and to empower the council to call upon the taxpayer for the first time after the work was completed, but it has not done so. By failing to give sufficient previous notice and yet persisting in the prosecution of the work, the city has reversed the chronological order of the process enjoined by its charter.

The case presented by the defendants is one in which they have decided beforehand against the taxpayer in one of the most important particulars of the assessment scheme. Jurisdictional power cannot, like the phoenix, rise from its own ashes, and where the case presented is one in which full compliance with the essentials of jurisdiction cannot be had, repetition of the same process will never confer jurisdiction. In short, it appears by the record that, on account of the improvement having been previously made and not still in contemplation, it is impossible for the council, in the language of the charter, to cause a new assessment "to be made in like manner for the same purpose."

It is unnecessary for us to consider whether the pavement was good or bad, or whether the contractor complied with his engagement. Not having authority to proceed at all, the action of the city did not bind the taxpayers. These considerations lead to a reversal of the decree and the rendition of one here according to the prayer of the complaint.

REVERSED AND DECREE RENDERED.

MR. JUSTICE EAKIN did not sit.

Argued May 7, affirmed June 29, 1915.

**RATHFON v. PAYETTE-OREGON SLOPE IRR.
DIST.**

(149 Pac. 1044.)

Waters and Watercourses—Irrigation—Irrigation Districts—Irrigation Improvement Companies—"Public Corporation"—"Quasi-public Corporation."

1. The irrigation districts provided for by Section 6167 et seq., L. O. L., as amended by Laws of 1911, page 378, are "public corporations," and by the amendment of 1915 (Laws 1915, p. 234), are municipal subdivisions of the state, with the power of self-government and control in all matters relating to the general purpose of their organization, while district improvement companies, the organization of which are authorized by Laws of 1911, page 256, are also "quasi-public corporations."

Statutes—Construction—Intention of Legislature.

2. A legislative act must be so construed as to make it operative, and to carry out the purposes indicated by the lawmakers.

[As to rules for construing statutes, see note in 12 Am. St. Rep. 826.]

Waters and Watercourses—Irrigation District—Inclusion of Land in Improvement District—Statutes.

3. Section 6167 et seq., L. O. L., as amended by Laws of 1911, page 378, provides for the organization of irrigation districts on proposal of 50 or a majority of the holders of title to lands susceptible of irrigation from common sources and by the same system, and also provides that there shall be excluded from any such district lands already irrigated or entitled to be irrigated from any source or by another system of irrigation works. Laws of 1911, page 256, provides for the incorporation of land owners as improvement companies, and that on such incorporation and record of notice thereof, the debts of such corporation shall be a prior lien on the lands described in the notice. Plaintiff's lands were included in an irrigation district against his petition after he had become a member of a district improvement company, whose members, including himself, had executed and recorded the notice subjecting their land to the liabilities of the corporation, among which were bonds sold aggregating \$55,000. *Held*, that plaintiff's land was not included in the district and not open to its assessments, as the legislature by the acts providing for irrigation districts and improvement companies did not intend to provide for separate quasi-public corporations to exercise the same delegated powers within the same area for a similar purpose at the same time, since if the irrigation district had power to tax plaintiff's land and sell the same on execution for nonpayment, nothing would be left to satisfy the liabilities of the district improvement company of which plaintiff was a member, and the obligation of its contracts would be impaired in violation of Article I, Section 21, of the Constitution.

Waters and Watercourses—Irrigation District—Exclusion of Lands—Estoppel.

4. Plaintiff, member of a district improvement company organized under Laws of 1911, page 256, was not estopped to contend that his lands were not rightfully included within an irrigation district, organized under Section 6167 et seq., L. O. L., as amended by Laws of 1911, page 378, merely because he did not appeal from the order of the board of directors of the irrigation district denying his petition for exclusion, since the irrigation district law (Laws 1911, p. 402, Section 33) provides for no appeal from such an order, while the question presented by plaintiff's petition was not determined in the suit brought under Section 33 by the directors of the irrigation district to have the organization of the district declared valid.

[As to petitioner for organization of irrigation district as "freeholder," see note in Ann. Cas. 1913D, 335.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit in which the plaintiff, D. W. Rathfon, seeks to enjoin the defendant, Payette-Oregon Slope Irrigation District, and W. H. Lucraft, a purchaser at a sale for taxes levied upon the district, from perfecting such sale and asserting any rights thereunder, and to exclude therefrom certain of the plaintiff's lands and declare the same in no way obligated by reason of any bonds or other indebtedness, liens for taxes or otherwise, in the irrigation district. The plaintiff's lands, already mentioned, to wit, the northeast quarter of section 16, township 16 south, range 47 east, Willamette Meridian, containing 160 acres, are included within the Snake River District Improvement Company, a corporation organized under the provisions of Chapter 172, General Laws of Oregon, 1911. The defendant irrigation district is a corporation organized under the irrigation district laws of Oregon (Sections 6167 et seq., L. O. L., as amended, Chapter 223, Gen. Laws of Or. 1911, p. 378). The trial court rendered a decree in favor of the plaintiff and defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Julien A. Hurley*.

For respondent there was a brief with oral arguments by *Mr. John L. Rand* and *Mr. William H. Brooke*.

MR. JUSTICE BEAN delivered the opinion of the court.

The pleadings admit, and the evidence shows, that the district improvement company was organized prior to the irrigation district, and the articles of incorporation and notice provided by Chapter 172 were recorded in the office of the county clerk before any action was taken by the irrigation district. The defendants rely upon the defense that plaintiff is estopped from denying that his land is included within the irrigation district, and from denying that he is obligated by reason of the fact that confirmation proceedings have been had by the irrigation district. This states in brief the issues involved upon this appeal. Several errors are assigned, but all may be considered in one group; the nature of the assignments being that a decision should have been rendered in favor of the defendants instead of plaintiff.

1, 2. The improvement company filed a notice in the office of the county clerk to the effect that certain lands, including the plaintiff's, were contained within the area embraced by the district improvement company and subject to the obligations of that company. Afterward this company proceeded to procure its water right, and at the time of the trial had a complete system, satisfactory to the plaintiff and sufficient to properly irrigate his land. Plaintiff asserts that the irrigation district was organized without his knowl-

edge, and that his lands were included therein and confirmation proceedings had all unknown to him. An irrigation system was also completed by the irrigation district. At the time of the confirmation proceedings mentioned (see *Board of Directors v. Peterson*, 64 Or. 46 (128 Pac. 837, 129 Pac. 123), it appears that it was considered by the officers of the irrigation district that the lands of plaintiff were not permanently included within the district. It appears from the transcript in that case that the contract for the sale of bonds contained the following provision:

“And it is also understood and agreed that in determining the acreage entitled to water from said system at the date hereof the northeast quarter of section 16 in township 16 south, range 47 east, has not been included, and if said lands remain in the district, then the first party shall be entitled to bonds at the rate aforesaid for said land, the same to be delivered on October 1, 1912, and in that event the amount of bonds to be placed in escrow shall be reduced accordingly.”

It is perhaps necessary to consider the objects and purposes of the irrigation district and the district improvement laws. The irrigation law was enacted in 1895 (see Gen. Laws 1895, p. 13, Section 6167 et seq., L. O. L.), the title thereof being as follows:

“To provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes.”

The title of the district improvement law of 1911 is as follows:

“To enable land owners to incorporate themselves for the purpose of irrigation or drainage, defining their

corporate powers, regulating the manner of issuing bonds, making the debts of said corporation a lien on the land of said owners and fixing the organization and annual license fees of such corporations."

The irrigation district law also has a provision for drainage. The object and purpose of the two acts are apparently the same, that of improving the arid lands of the state. The essential difference between the two organizations is that in the district improvement law the inclusion of land in the first instance is entirely voluntary, whereas in the irrigation district law, 50 or a majority of the voters qualified by law to vote at an irrigation election may include therein the land of the remaining land owners against their will, provided the land is not legally entitled to be excluded. The irrigation districts under the act governing their organization are public corporations, and by the amendatory act of 1915 are designated as municipal subdivisions of the state having the power of self-government and control in all matters pertaining to the general purpose for which they are organized. District improvement companies are also *quasi*-public corporations. It is a general rule of statutory construction that a legislative act shall be so construed as to make the same operative and carry out the purposes indicated by the lawmakers. Both of these acts should be so interpreted, having due regard to all the provisions thereof, in order to give them full force and effect: *Wilder v. Board of Directors*, 55 Colo. 363 (135 Pac. 461, 463).

3. It is the position of plaintiff that there cannot be at the same time within the same territory two municipal corporations exercising the same powers, jurisdictions and privileges, and they cite 1 Dillon, Mun.

Corp. (4 ed.), Section 184. A conflict arises as to whether the land of plaintiff is included within the irrigation district or within the district improvement company. It involves the construction of the two acts, particularly the irrigation district law, and resort must be had to the facts to determine where the land in question properly belongs. The contention of plaintiff is that, the land being first included within the district improvement company, any attempt made by the irrigation district to include the land therein was without jurisdiction and void. This was upheld by the Circuit Court.

The irrigation district law (Section 6167, L. O. L., as amended Laws 1911, p. 378), in so far as it is deemed material to this case, provides that whenever 50 or a majority of the holders of title to lands susceptible of irrigation from common or combined sources and by the same system of works desire to provide for the irrigation of the same, they may propose the organization of an irrigation district. Section 6168 directs that for the purpose of organizing such a district a petition shall be presented to the County Court setting forth and particularly describing the boundaries of the proposed irrigation district, and stating the purpose. It requires the petitioners to furnish a bond for costs in case the organization is not effected; requires the publication thereof, and directs that on a final hearing the County Court—

“may make such changes in the proposed boundaries as the court may find proper, and shall establish and define such boundaries; provided, that no land included within the limits of any city or town shall be included in any irrigation district; that said court shall not modify said boundaries so as to except from the operation of this act any territory within the bound-

aries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district, nor shall any lands which will not, in the judgment of said court, be benefited by irrigation by said system, be included within such district."

The section further provides that any person whose lands are susceptible of irrigation from the same sources may, in the discretion of the court, upon written application, have his lands included in the district. On final hearing the court shall make and enter an order determining whether the requisite number of owners of the land within such proposed district shall have petitioned for the formation thereof, and whether the petition and notice of the time of presentation thereof shall have been duly published, and said order shall be conclusive evidence of the facts found by the court. The act then makes provision for dividing the district into divisions for the purpose of elections; provides in detail the manner of elections; authorizes the formation of a general plan of proposed works to be acquired by lease or purchase; that the cost thereof be estimated; and for the issuance and sale of bonds to provide funds therefor. In Section 6186, as amended in 1911, page 389, we find the provision:

"That in no case shall any land be taxed for irrigation purposes under this act which from any natural causes cannot be irrigated or which is incapable of cultivation."

—and the further provision:

"That where ditches, canals, reservoirs or other irrigation works or pumping plants are actually constructed and in operation at the time of the organization of the irrigation district, the lands actually irrigated therefrom at that time shall not be liable to

be taxed under the provisions of this act, except for benefits accruing thereto by reason of the construction or maintenance of a drainage system or works by said district, until such time as such irrigation district shall purchase, lease or acquire, by condemnation or otherwise, such ditches, canals, reservoirs, pumping plants or other works, including water rights; provided, however, nothing in this act shall inhibit the board of directors from at any time entering into a contract respecting any lands within said district exempting such lands from liability under this act except from debts already incurred, upon condition that the district be exempted from any liability or duty to furnish water or other benefit to such lands."

Section 25 of the amendatory act authorizes the boundaries of any irrigation district to be changed, and tracts of land which were included therein to be excluded therefrom—

"but neither such change of the boundaries of the district nor such exclusion of lands from the district shall impair or affect its organization, or its right in or to property, or any of its rights or privileges of whatever kind or nature; nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which said district was and may become liable or chargeable, had such change of its boundaries not been made, or had not such land been excluded from the district."

It provides for notice to be given in case of petition for such exclusion, for a hearing by the board of directors, and for objections to be made to said petition. Subdivision (d) of said section further directs the manner of hearing and the authority of the board in the matter of exclusion of land. It provides:

"That it shall be the duty of said board to so order, upon petition therefor, * * that all lands so petitioned to be excluded from said district shall be

excluded therefrom which cannot be irrigated from or which are not susceptible to, or would not by reason of being permanently devoted to uses other than agricultural, horticultural, viticultural or grazing, be directly benefited by the actual irrigation of the same from a common source, or by the same system of works with the other lands of said district, or from the source selected, chosen or provided, or the system adopted for the irrigation of the lands of said district, or which are already irrigated, or entitled to be irrigated, from another source or by another system of irrigation works."

Subdivision (e) of this section provides that if there be outstanding bonds of the district at the time of filing said petition, the holders of said bonds may give their assent to the exclusion of any such lands from a district by order of said board or by the decree of the Circuit Court as hereinafter provided; that if said lands are so excluded they shall be released from the lien of said bonds. Subdivision (f) states that, notwithstanding the lands may be excluded, the district shall remain an irrigation district to every intent and purpose as though said lands had not been excluded.

Turning to the district improvement law of 1911, page 256, we find that any number of land owners, not less than three, may incorporate and file articles of incorporation for the purpose of improvement of the lands by irrigation or drainage, or both. Section 5 thereof provides that, upon filing the articles of incorporation, the owners of all the lands described in the articles shall make, subscribe and acknowledge, before some person authorized to take the acknowledgment of deeds, a notice—

"to whom it may concern that the lands described in said notice will be improved by irrigation or drainage or both by said corporation under the provisions of

this act. Said notice shall be recorded in the office where deeds and other instruments affecting the title to real property are recorded, of the county or counties where the land is situated. From and after the recording of said notice all the debts and obligations of said corporation theretofore or thereafter created shall be a lien upon all the land described in said notice prior to every lien attaching to said land subsequent to the date of recording said notice, except state, county and school taxes, whether such debt or obligation of said corporation be in existence at the time such later lien attaches or be created afterward, and said lien shall not be personal, but shall be an obligation upon the land and shall run with the land."

The act confers upon such corporation the power of eminent domain, and enumerates the manner of the organization, powers and duties of officers, etc.

From the provisions of the acts to which we have referred at some length, it will be noticed that their objects and purposes are identical. When carried out, they reach the same end simply by a different route. It is shown and should be borne in mind, that prior to the organization of the irrigation district, the district improvement company was organized, and the owners of land, including the plaintiff, Rathfon, executed and recorded the notice provided for in the act, and thereby subjected their land to the liabilities of the corporation, among which were bonds issued and sold, amounting to the sum of \$55,000. This solemn contract executed under the provisions of the law must be taken into consideration in this case. The Constitution of this state (Article I, Section 21) provides that:

"No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in

this Constitution; provided, that laws locating the capital of the state, locating county seats, and submitting town and corporate acts, and other local and special laws, may take effect or not, upon a vote of the electors interested."

Hence it is necessary to inquire whether or not by the two acts the legislature intended to provide for the creation of two separate *quasi*-public corporations for the purpose of exercising the same delegated powers within the same area, for a similar purpose, at the same time. This case is an illustration of the rule that such cannot be done without the existence of chaos: 1 Dillon, Mun. Corp. (4 ed.), § 184; *In re Madera Irr. Dist.*, 92 Cal. 296 (28 Pac. 272, 675, 27 Am. St. Rep. 106, 14 L. R. A. 755); *Straw v. Harris*, 54 Or. 424 (103 Pac. 777). If the irrigation district has full power to tax the lands of plaintiff and sell the same upon an execution for the nonpayment thereof, then nothing will be left to satisfy the liabilities of the district improvement company's indebtedness, and its obligations must necessarily be impaired. In the case of *In re Sanitary Board*, 158 Cal. 453 (111 Pac. 368), in referring to this question, it is said:

"These rules do not rest upon any theory of constitutional limitation. In the absence of any constitutional restriction, the legislature has absolute power over the organization, the dissolution, the extent, the powers and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government."

The question as to the effect the exclusion of plaintiff's lands from the district might have upon the bonds of the irrigation district, which have been issued, need not here be determined, as the bondholders are not parties to this suit. From the statement

made above, however, it will be noticed that at the time of the execution of the contract for the sale of the bonds and the purchase of the irrigation works there was some question raised as to whether or not plaintiff's lands would be excluded or included from the district, so the purchasers of the bonds had notice of the proceedings. It appears from the record herein that the attorney in fact for the plaintiff forwarded to the County Court of Malheur County a petition on behalf of plaintiff, Rathfon, showing that his lands were included within the district improvement company, and asking that the same be excluded from the irrigation district. As we understand the record, it appears that in order not to delay the organization of the irrigation district, the petition for the exclusion of plaintiff's lands was held in the hands of the county clerk in abeyance, without being marked "Filed," until March 9, 1912. It is in evidence that it was then the assurance of the attorney for the irrigation district that after the district was organized the land should be excluded therefrom. Afterward a similar petition was presented to the board of directors of the irrigation district, and it was denied. Plaintiff alleges that his land was fraudulently included within the irrigation district.

4. It is suggested by counsel for defendants that plaintiff is estopped from contending that his lands are not rightfully included within the irrigation district, for the reason that he did not appeal from the order of the board denying his petition therefor. The irrigation district law of 1911, Section 33, provides for no appeal from such an order, and specially authorizes the board of directors to bring a suit to determine the validity of the action of the County Court and various

orders of the board of directors of said irrigation district including or excluding any lands in or from the district and various other orders. Section 34 of the act authorizes any assessment payer or other interested person to bring a like proceeding in the Circuit Court in the event that the board of directors do not bring such proceedings within 30 days after the entry of the order or performance of any acts enumerated in Section 33.

The question therefore arises as to whether the proceedings relating to plaintiff's lands were involved in the suit, brought by the directors of the irrigation district to have the organization of the district declared valid, which was appealed to this court. There is no question but that the district was regularly organized and the bonds regularly issued. Such proceedings are unquestioned in this case, the only question being as to whether or not plaintiff's lands are included in the district. We are relieved from examining the record to ascertain whether this question was involved in the suit referred to by the stipulation of the parties to this proceeding, found on page 77 of the transcript of evidence, which is to the effect that it is admitted by defendants that plaintiff's petitions for the exclusion of lands, Exhibits 8 and 11, filed in the County Court of Malheur County, Oregon, "were not included in the determination in the suit" in the Circuit Court or Supreme Court: See *Sowerwine v. Central Irr. Dist.*, 85 Neb. 687 (124 N. W. 118), which is somewhat in point. The plaintiff did not neglect to make application to the proper authorities to have his land excluded, and in this respect the case differs widely from that of *Wilder v. Board of Directors*, 55 Colo. 363 (135

Pac. 461, 463). . The defendant district should bear the burden of the irrigation system without assistance from plaintiff's land which should be excluded therefrom.

It follows from the plain direction of the legislative enactments that the decree of the lower court should be, in all things, affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

Embodied in Chapter 172 of the Laws of 1911 is a procedure whereby any number of land owners, not less than three, may incorporate themselves for the purpose of irrigating or draining, or irrigating and draining, their own lands in the manner therein prescribed. Having executed the required articles, wherein, among other things, the particular description of the lands embraced in the project is set out, the owners are required unanimously to sign and acknowledge a notice to whom it may concern that the realty included in the scheme will be improved by irrigation or drainage, or both. Upon filing the notice for record like a deed to real property, the corporation is authorized to incur debts and obligations which shall constitute liens to run with the land. Membership in the concern depends upon ownership of realty affected by the undertaking. Generally, the institution is authorized to sue and be sued, to enter into contracts, to exercise the power of eminent domain for the purpose of carrying out its objects, to fix rates, levy assessments and issue bonds. The general design is to provide for the organization of a private corporation for the purposes detailed above. At the same session of

the legislature Chapter 223 was enacted, providing for the organization of irrigation districts, under the supervision of the County Court, on the petition of 50 or a majority of the holders of title to land susceptible of irrigation from a common source. A prominent feature of this system is an election upon published notice under the supervision of the County Court to determine whether the district shall be organized, which, being favorable, empowers the corporation to tax the property within its territory, to issue bonds when authorized by an affirmative vote of the electors within the district, and generally to carry on business much the same as the private corporation, already mentioned, as organized under Chapter 172. The defendant was called into existence by a vote of the freeholders of its district. It has taken proceedings that resulted in a sale of the plaintiff's land for the payment of an assessment which it is said to have levied thereon. The individual defendant Lucraft is the purchaser at that sale. The plaintiff, asserting that he is a member of a private corporation known as the Snake River District Improvement Company, which includes his lands, and which was organized under Chapter 172, *supra*, prior to the formation of the defendant irrigation district, claims that his realty is exempt from the authority of the defendant, and asks that the assessment be set aside and his property excluded from the boundaries of the defendant district. The defendant, after making some denials, avers its organization, the publication of notice thereof, and the election resulting favorably thereto, all with the knowledge of the plaintiff, claiming as a result that he is estopped thereby. A further matter in estoppel is based upon a proceeding under the statute authorizing the institution of the

defendant, whereby the Circuit Court in the case of *Board of Directors of the Payette-Oregon Slope Irr. Dist. v. Peterson*, 64 Or. 46 (128 Pac. 837, 129 Pac. 123), determined the regularity of the organization of the defendant and its issuance of bonds. The new matter of the answer is denied by the reply. From a decree for the plaintiff the defendants appeal.

The question here to be determined is whether or not the plaintiff's land is subject to taxation at the hands of the defendant irrigation district. The claim of the defendants is either valid *in toto* or wholly void. The plaintiff is either entitled to have the proceedings under which his land was sold utterly disregarded, or he is subject to pay the amount required for redemption, in default of which he must lose his land. His contention is that the Snake River District Improvement Company, which he assisted in organizing, is a municipal or public corporation possessing governmental powers, and, being prior in time of organization, is paramount to and exclusive of the irrigation district which he likewise styles a public corporation. His theory is that two public corporations exercising the same functions cannot exist in the same territory nor exercise authority over the same persons or things. Whatever may be said of the Snake River District Improvement Company, it is clearly not a municipal nor public corporation. It was formed by the voluntary unanimous acts of the corporators. It exists solely for private purposes, the improvement of the lands of the individual corporators. It does not possess the power of taxation. Like any other private corporation it has the power to assess and collect dues from its members, enforcing them as provided in Section 9, Chapter 172, *supra*, by a foreclosure

suit in equity. The burden imposed upon the lands is the result of the voluntary contractual action of persons directly interested in the result. The corporation under Section 12 of the act must pay to the Secretary of State an organization fee and an annual license fee like any other private corporation. These characteristics serve to exclude the Snake River District Improvement Company from the category of a municipal or public corporation, whatever may be said of the defendant institution. On the other hand, referring to Chapter 223 of the Laws of 1911, we find provided in Section 6167, L. O. L., as amended by the latter act:

“Whenever fifty, or a majority of the holders of title to lands susceptible of irrigation from a common source or combined sources and by the same system or combined systems of works desire to provide for the irrigation of the same, they may propose the organization of an irrigation district, under the provisions of this act, and when so organized such district shall have the powers conferred, or that may hereafter be conferred, by law, upon such irrigation districts.”

The rule for inclusion of lands as thus defined is that they must be susceptible of irrigation from a common source or combined sources, and by the same system or combined systems of works. The exceptions to this general rule are found in the following language quoted from Section 6168, L. O. L., as amended:

“Provided, that no land included within the limits of any city or town shall be included in any irrigation district; that said court shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district, nor shall any lands which

will not, in the judgment of said court, be benefited by irrigation by said system, be included within such district."

What may be termed a *quasi* exception is also found in Section 6186, treating of the assessment of taxes upon property within the district as follows:

"Provided, that in no case shall any land be taxed for irrigation purposes under this act which from any natural causes cannot be irrigated or which is incapable of cultivation; and provided further, that where ditches, canals, reservoirs, or other irrigation works or pumping plants are actually constructed and in operation at the time of the organization of the irrigation district, the lands actually irrigated therefrom at that time shall not be liable to be taxed under the provisions of this act, except for benefits accruing thereto by reason of the construction or maintenance of a drainage system or works by said district, until such time as such irrigation district shall purchase, lease or acquire, by condemnation or otherwise, such ditches, canals, reservoirs, pumping plants or other works, including water rights."

Again in Section 6179, as amended, in speaking of the board of directors, this language is used:

"Said board shall also have the right to acquire, either by lease, purchase, condemnation, or other legal means, all lands and waters and water rights, rights of way and other property, including canals and works constructed and being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canal or canals and works proposed to be constructed by said board, and shall also have the right to so acquire lands and all necessary appurtenances for reservoirs for the storage of needful waters, or for any other purpose reasonably necessary for the purpose of said district. The property, the right to condemn which is hereby given shall include property already devoted

to a public use which is less necessary than the use for which it is required by the district, whether used for irrigation or any other purpose. * * The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with all water rights and rights to appropriate water, rights of way for canals and ditches, sites for reservoirs and all other property required in fully carrying out the provisions of this act is hereby declared to be a public use more necessary and more beneficial than any other use, either public or private, to which said water, water rights, rights to appropriate water, lands or other property have been or may be appropriated within said district to an extent less than the whole thereof."

The act under which the Snake River District Improvement Company was formed is merely cumulative legislation on the subject of the formation of private corporations. Everything that could be accomplished by that act could have been effected by a corporation organized under previous legislation. Designedly the enactments under which the Payette-Oregon Slope Irrigation District was formed is wider in its scope, and gives to such an institution far greater and more comprehensive powers than the other act referred to. The authority exercised by the defendant is based upon the will of the people in establishing a district susceptible of irrigation from a common source. Its sanction is visited upon the willing and the unwilling, provided a majority of the voters so direct. Its organization is carried on under the supervision of a judicial tribunal, the County Court. It possesses the power of taxation and its monetary exactions promulgated under that authority are enforced by the tax collectors at the same time and in the same manner as state and county taxes are collected. It is plain that if the plaintiff had so

desired, he might have petitioned for the organization of such a district as the defendant. Although he may have provided through his private corporation or on his own individual resources for the irrigation of his land, he was eligible to vote for the formation of the defendant institution. Being thus qualified to enter into it voluntarily, he is subject to the majority action of other landholders similarly situated. In the exercise of its police power the legislature has provided against the possibility of a small minority escaping its just contribution to the public good by the mere organization of an inadequate scheme sufficient only to comply with the bare letter of the law. The act under which the defendant was organized requires that:

"The court shall in all actions or suits or other proceedings take judicial knowledge of the organization of, and boundaries of all irrigation districts which have been heretofore or may be hereafter organized under the provisions of this act": Section 6169, L. O. L., as amended:

The same section provides for a contest of the election on organization by any person owning property within the proposed district liable to assessment. It requires that the contest shall be instituted within 60 days after the canvass of the vote and the announcement of the result by the County Court, and declares that:

"After the expiration of said period of sixty days no action or suit shall be commenced or maintained or defense made affecting the validity of the organization of any irrigation district organized under the provisions of this act."

The whole substance of the plaintiff's complaint is bound up in the sufficiency or nullity of the defendant

district, as affecting his lands. In several cases we have held that this question cannot be raised nor decided by injunction: *Bennett Trust Co. v. Sengstacken*, 58 Or. 333 (113 Pac. 863); *Splonskofsky v. Minto*, 62 Or. 560 (126 Pac. 15); *Tyree v. Crystal District Improvement Co.*, 64 Or. 251 (126 Pac. 605).

The act authorizing the existence of the defendant establishes a procedure for the subsequent exclusion of lands rightfully included in the first instance. The owner of realty who desires to have the same excluded is required to petition the board of directors for that purpose. Notice must be given by publication in some newspaper, requiring persons objecting to the same to show cause why it should not be granted. The exclusion of such land is left to the discretion of the board as the best interest of the district shall appear to them; but with this proviso appearing in subdivision (d) of Section 25, Chapter 223, Laws of 1911:

"Provided, that it shall be the duty of said board to so order, upon petition therefor, as aforesaid, that all lands so petitioned to be excluded from said district shall be excluded therefrom which cannot be irrigated from or which are not susceptible to, or would not, by reason of being permanently devoted to uses other than agricultural, horticultural, viticultural or grazing, be directly benefited by the actual irrigation of the same from a common source, or by the same system of works with the other lands of said district, or from the source selected, chosen, or provided, or the system adopted for the irrigation of the lands of said district, or which are already irrigated, or entitled to be irrigated, from another source or by another system of irrigation works."

The complaint was amenable to the general demurrer because it does not show that the plaintiff's lands come within any of the exceptions mentioned.

It is not within the limits of any city or town. It is not impossible to irrigate it. On the contrary, it appears clearly in the testimony, and is not contradicted by the complaint, that plaintiff's holdings are susceptible of irrigation from a common source applicable to other lands within the project of the defendant. The complaint does not show, either, that the plaintiff's realty was actually irrigated at the time of the organization of the defendant district. On this point the testimony unquestionably shows that the land has not, even to the time of the hearing, been irrigated from any source. This excludes it from the exception against taxing lands actually irrigated.

Mention is made of an application of the plaintiff to have his lands excluded, but this was not prosecuted beyond the action of the board of directors, and even if he had shown that his lands were already irrigated, or entitled to be irrigated, by any source or from another system of irrigation works, this would not exempt him from obligation to pay existing liens or indebtedness, for it is provided in subdivision (i) of Section 25, *supra*:

"Nothing in this act provided shall, in any manner, operate to release any of the lands so excluded from the district from any obligation to pay, or any lien thereon, of any valid outstanding bonds, or other indebtedness of said district at the time of the filing of said petition for the exclusion of said lands, but upon the contrary said lands shall be held subject to said lien, and answerable and chargeable for and with the payment and discharge of all of said outstanding obligations at the time of the filing of the petition for the exclusion of said land, as fully as though said petition for such exclusion were never filed and said order or decree of exclusion never made; and for the purpose of discharging such outstanding indebtedness, said

lands so excluded shall be deemed and considered as part of said irrigation district the same as though said petition for its exclusion had never been filed or said order or decree of exclusion never made and all provisions which may have been resorted to, to compel the payment by said land of its quota or portion of said outstanding obligation, had said exclusion never been accomplished, may, notwithstanding said exclusion, be resorted to to compel and enforce the payment on the part of said land of its quota or portion of said outstanding obligations, of said irrigation district for which it is liable, as herein provided."

In brief, the organization of a district like the defendant is a proper exercise of the power of the people, manifested by an election held under the forms of law for that purpose. It voices the greatest good for the greatest number, and cannot be obstructed by any dog-in-the-manger policy of a minority. The plaintiff had his opportunity to contest the validity of the corporation, and the election resulting in its organization, at any time within 60 days after the result of the vote was declared. He did not avail himself of that privilege so far as the record discloses. Under the terms of the statute this concludes him. Moreover, as disclosed by the record, acting under the authority of the statute, the directors instituted a suit to determine the validity of the organization of the defendant and its right to issue bonds. By virtue of the law in question, the plaintiff had a right to appear in that procedure and again contest the regularity of the defendant organization, including its right to tax his holding. He suffered that opportunity to pass. He availed himself of the right to petition for the exclusion of his land, and his petition was denied. He has had his day in court on all these several occasions, and it is too late now, and the procedure in this case is unavailing, as we have

seen, to test the questions he would raise. He had a right to employ as many private means as he chose to irrigate his land; but this does not exclude the right of the people who live under similar conditions to make him contribute ratably to the larger and more comprehensive scheme of general irrigation. The act under which the defendant operates declares the use of water in which it engages paramount to every other use. It authorizes the condemnation of such works as the Snake River District Improvement Company is shown to have contemplated. Whether we consider the corporations public or private, they are clearly in different classes so far as their organization is concerned. The legislative power, as well it might, has vested the defendant corporation with greater and more extensive power than that possessed by the improvement company inaugurated by the plaintiff and his associates. The latter must yield to the greater authority of the defendant district. These considerations lead to a reversal of the decree of the Circuit Court, without prejudice to the right of the plaintiff to redeem his land from the effect of the sale as permitted by the statute.

For these reasons I dissent from the majority opinion.

Submitted on briefs May 5, affirmed June 29, 1915.

**PAYETTE-OREGON SLOPE IRR. DIST. v.
PETERSON.**

(149 Pac. 1051.)

**Waters and Watercourses—Irrigation Districts—Proceedings of
Board of Directors—Resolution Proposing Bond Issue.**

1. A reasonable construction of the language found in a record of a resolution of the board of directors of an irrigation district, authorizing a bond issue, should be given to make the same express its intent as manifested, since the technicality of a court record cannot be expected therein.

Waters and Watercourses—Irrigation Districts—Bonds—Notice—Statute.

2. Under Section 6184, L. O. L., providing that before making a sale of irrigation district bonds, the board of directors shall, by resolution, declare its intention to sell a specified amount, fix the time and place of such sale, and give notice by publication thereof at least 30 days in three newspapers published in the state, one of which shall be a newspaper published in the county in which the office of the board of directors is situated, if a newspaper is published in such county, where the time of receiving bids for the sale of such bonds was fixed at 11 A. M. on July 15, 1914, and notice was published in one morning newspaper five successive Fridays, from June 12th to July 10th, in a second paper, a weekly, five times from June 13th to July 11th, and in a third paper, another weekly, five times from June 11th, to July 9th, the publication was sufficient, under the statute, since under the rule of computation that one week is equivalent to seven days, the notice was published for more than 30 days.

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

On September 15, 1914, the board of directors of the Payette-Oregon Slope Irrigation District commenced a special proceeding under Sections 29 and 32 of Chapter 223 of the General Laws of Oregon for 1911, providing for irrigation districts, for the purpose of securing an examination and confirmation by the Circuit Court of the proceedings of the board of directors relative to the authorization and sale of the bonds of the district in the amount of \$15,000. Octo-

ber 21, 1914, was fixed as the date for persons interested to appear and answer or plead to the petition. Notice and summons were duly published. On the date named appellant, L. E. Peterson, a land owner in the district, filed an answer, denying on information and belief substantially all the facts set forth in the petition. Upon the trial of the cause, oral and documentary, evidence was introduced, showing all the proceedings taken in the matter by the board of directors in the issuance and sale of the bonds. The trial court found the proceedings of the board of directors regular and legal, and entered a decree confirming and approving them and declaring the bonds legally issued. From such decree defendant L. E. Peterson appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted by *Mr. Julien A. Hurley*.

For respondent there was a brief over the name of *Mr. William H. Brooke*.

MR. JUSTICE BEAN delivered the opinion of the court.

The record sets out all the documents and proceedings bearing upon the questions at issue. The appellant contends that the proposed bond issue is not for a purpose authorized by the statute. The district had been regularly organized: See *Board of Directors v. Peterson*, 64 Or. 46 (128 Pac. 837, 129 Pac. 132). Surveys and plans for the acquisition of a system of irrigation works had been made in accordance with

the statute, and a bond issue of \$276,000 sold. The act in question authorizes the organization of an irrigation district for a beneficial public purpose, that of reclaiming the semi-arid lands of the state, which is apparently the main object of the law. Section 6182, L. O. L., as amended in 1911 (Laws 1911, p. 385), provides:

“For the purpose of procuring necessary reclamation works, and acquiring the necessary property and rights therefor and otherwise carrying out the provisions of this act, the board of directors of any such district shall, as soon as practicable after the organization of any such district, by a resolution entered on its records, formulate a general plan of its proposed works, in which it shall state in a general way what works or property it proposes to lease, purchase, or acquire, and what work it proposes to construct, and the estimated cost for carrying out said plan, and how it proposes to raise the necessary funds therefor.”

For the purpose of estimating the cost thereof the law directs the board of directors of the district to have surveys and plans made to demonstrate the practicability of such plan, under the supervision of a competent engineer, and submitted to the state engineer for his report. An election is authorized to be held for the purpose of determining whether or not bonds of the district shall be issued. The act provides the manner of calling and holding such an election. The record shows that all this has been done in compliance with the statute. That section further provides as follows:

“Whenever thereafter said board in its judgment deems it for the best interest of the district that the question of the issuance of bonds in said amount or any amount, shall be submitted to said electors, it shall so declare of record in its minutes, and may thereupon

submit such questions to said electors in the same manner and with like effect as at such previous election. The bonds authorized by any vote shall be designated as series, and the series shall be numbered consecutively as authorized. The portion of bonds of a series sold at any one time shall be designated as an issue, and each issue shall be numbered in its order."

Section 6184 provides in part that:

"The board may sell bonds from time to time in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to fully carry out the object and purposes of this act."

This clearly indicates that the law does not contemplate that all the bonds of the district should necessarily be issued at one time. The statute further provides that before making such sale the board shall, by resolution, declare its intention to sell a specified amount of bonds, and fix the day, hour and place of such sale, such resolution to be entered on the minutes, and notice of sale to be given by publication thereof at least 30 days in three newspapers published in the State of Oregon, one of which shall be a newspaper published in the county in which the office of the board of directors is situated, if there be a newspaper published in said county.

After an examination and report of the district engineer, recommending additional construction upon the irrigation system of the district, and certain equipment for the same, which report was approved by the state engineer, the board of directors of the district passed and entered a resolution to the effect that the Payette-Oregon Slope Irrigation District purchase a dredge and other equipment, and install the

headgates and other structures "and complete the construction of the canals of the district by concrete, lining certain portions thereof, and by installing at least eight check-gates in said canals," as recommended by the engineer; that for the purpose of obtaining the property and providing for the construction which it was deemed necessary for the proper operation of the irrigation system, \$15,000 would be required, which the district should raise by the issuance of coupon bonds to that amount; and that a special election be called for the first of June of that year, making provision therefor, and requiring the secretary to give notice thereof, according to the provisions of the act, which was duly complied with.

1. It is suggested by counsel for appellant, Peterson, that there was no declaration made by the board to the effect that the construction fund for the irrigation works had been exhausted, or that such works had not been completed. We do not give the resolution of the board this construction. The board simply uses different language to the same effect. The necessity of the bonds is plainly declared, and the resolution recites that they are for the purpose of completing the irrigation works. It does not indicate that funds are desired for a reconstruction of the irrigation system, but for the completion thereof, and the specifications made by the engineer are to the same import. A reasonable construction of the language found in the record of the meeting of the board of directors should be given so as to make the same express the intent manifested thereby. The same technicality of expression that appears in a court record would not be expected to be found therein. The plain meaning of the minutes is that the bonds are proposed

to be issued for the purpose of the further construction of irrigation works and the acquisition of property to be used in the furtherance of the plan adopted to effectuate the purpose of the legislative enactment, and the resolution in question fulfills the requirements of the statute in that respect, in letter and spirit: *Hall v. Hood River Irr. Dist.*, 57 Or. 69 (110 Pac. 405); *Pioneer Irr. Dist. v. Campbell*, 10 Idaho, 159 (77 Pac. 328). The general plan of the irrigation system having been adopted prior to the first issuance of bonds, it was unnecessary to reiterate the same in the plans for additional construction. The authority to acquire necessary property implies power to improve the two acres of ground used as a site for the district pumping plant in order to develop and make it productive.

2. It is contended by counsel for defendant Peterson that the publication of the notice of the sale of bonds was insufficient. The time for receiving bids for the sale of the bonds was fixed as July 15, 1914, at 11 o'clock A. M. As shown from the quotation above, publication of the notice is required to be made for 30 days. The affidavits in the record disclose that the notice of the sale of the bonds, which was in due form, was published as follows: In the "Morning Oregonian," five successive Fridays, from June 12th to July 10th, or 34 days immediately prior to the date fixed for the sale of the bonds; in the "Malheur Enterprise" weekly five times, from June 13th to July 11th, or for 32 days; and in the "Ontario Democrat," weekly five times, from June 11th to July 9th, or for 34 days. Such publication was a strict compliance with the requirements of the statute, and was sufficient: *O'Hara v. Parker*, 27 Or. 156, 174 (39 Pac. 1004); 32 Cyc. 486, 487; *S. & L. Society v. Thompson*,

32 Cal. 347; *McGilvery v. City of Lewiston*, 13 Idaho, 338 (90 Pac. 348); *Leach v. Burr*, 188 U. S. 510 (47 L. Ed. 567, 23 Sup. Ct. Rep. 393). The rule for the computation of the time of publication adopted in the *O'Hara Case*, which has stood the test for 20 years, indicates that one week is equivalent to seven days. The notice in question, having been published for more than the required number of days fulfilled the mandate of the statute.

Section 35 of the Irrigation District Act ordains that:

"The court hearing any of the contests provided for by this act, or any inquiry into the legality or correctness of any of the proceedings herein provided for, must disregard any error, irregularity, informality, or omission which does not injuriously affect the substantial rights of the parties to said proceeding. * * "

While it is unnecessary to apply this section in this case, it indicates that it was the legislative design that the spirit of the act should be consummated. Section 6213, L. O. L., as amended by the General Laws of Oregon for 1913, page 54, provides in effect that the officers of the district shall have no power to incur an indebtedness or liability in excess of \$200 per acre in the aggregate of the land situated in the district, and any debt or liability incurred in excess of such express provision shall be and remain absolutely void, except that for the purpose of organization, the board of directors may incur an indebtedness not exceeding \$1 per acre on such land. It is shown by the reference made in the record in this proceeding that the present indebtedness of the district is but little in excess of \$40 per acre, and the limit fixed in the inhibition clause contained in Section 6213 has not been approached.

In so far as the case affects the lands of defendant D. W. Rathfon, the matter is determined by the decree in the case of *Rathfon v. Payette-Oregon Slope Irr. Dist.*, ante, p. 606 (149 Pac. 1044), in which an opinion has just been rendered, excluding his lands from the district.

After a careful examination of all the records and proceedings relating to the authorization of the issuance and sale of the bonds of the district in the sum of \$15,000, we find that the same were in all things regular and legal, and that the said bonds and the order for the sale and the sale thereof are legal and valid.

It follows that the decree of the lower court is therefore affirmed.

AFFIRMED.

Argued May 6, affirmed June 8, rehearing denied July 6, 1915.

MASCALL v. MURRAY.*

(149 Pac. 517; 149 Pac. 521.)

Adverse Possession—Pleading—"Hostile"—"Peaceable."

1. Where the complaint, in suit to quiet title secured by adverse possession, alleged that such possession had been "peaceable" and "hostile," there was no such conflict in the meaning of the terms as implied that the possession had not been hostile to the owner, since "hostile" meant that the plaintiffs had been in possession as owners as distinguished from one holding in recognition of or in subordination to the true owner, while "peaceable" meant that their possession had been undisturbed and its continuity unbroken.

Equity—Pleading—Reply—Departure.

2. In suit to quiet title, where the complaint set up in one paragraph fee-simple ownership, and in another title by adverse possession, while the reply alleged that it had been gained by sale on execution, concluding by saying that, immediately after such sale, the

*Generally as to use of possessory title as weapon of offense and to quiet title, see note in 46 L. R. A. (N. S.) 487, 506.

As to lapse of time as bar to confirmation of judicial sale, see note in 43 L. R. A. (N. S.) 630.

plaintiffs took possession and held continually, the complaint and reply were not so inconsistent as to render erroneous the refusal of the court to strike the reply as a departure, since the complaint's allegation of fee-simple ownership rendered permissible its further amplification in the reply by the allegation of title by the sale.

Quieting Title—Possession by Plaintiff—Waiver by Defendant.

3. Where defendants, in a suit to quiet title, affirmatively asked complete relief, all parties submitting themselves to the jurisdiction of the court, such defendants waived the fact that plaintiffs were not in actual possession of part of the land at the time of suit.

Adverse Possession—Pleading—Issues.

4. In a suit to quiet title, an allegation of ownership in fee was sufficient to admit proof of title by adverse possession, since in such a suit it is not necessary for the complaint to divulge the chain of title or reveal probative facts; it being sufficient if the pleadings allege and name a substantial interest in the plaintiffs.

Quieting Title—Title to Support Suit—Equitable Title.

5. The owner of an equitable, as well as the owner of a legal title, may sue to quiet title to determine all adverse claims affecting his interest.

Quieting Title—Title by Equitable Estoppel—Pleading.

6. In a suit to quiet title, where the complaint alleged fee-simple ownership and title by adverse possession, the answer was a general denial, and the reply alleged title under sale on execution, and the evidence failed to support the claim of adverse possession, while it appeared that the execution sale did not confer a legal title on the plaintiffs, the evidence supporting an equitable title only, through the acquiescence of the defendants in the assertion of title by the plaintiffs, although an equitable estoppel, must be pleaded to make it available, nevertheless the plaintiffs could rely on the equitable estoppel of the defendants to vest title in them; for the answer of general denial afforded the plaintiffs no opportunity to plead title by estoppel in the reply, while the equities of an unpleaded estoppel may be availed of if such estoppel was not pleaded for lack of opportunity.

Quieting Title—Pleading—Legal and Equitable Title—Variance.

7. In an action to quiet title, where opportunity to plead an equitable title by estoppel is presented, but only a legal title is alleged, while equitable title is proved, such proof is a fatal variance.

Execution—Sale of Realty—Validity.

8. Where there was no official record of a sale of realty on execution, no order was made confirming the sale, and no deed delivered, although a certificate of sale was given to the purchasers, the legal title to the property remained in the judgment debtors, and the sheriff's sale did not convey a fee title, even if such sale was in fact regular in all respects.

[As to whether purchaser at judicial sale may be compelled to take title based on adverse possession, see note in *Ann. Cas.* 1912D, 1179.]

Execution—Title by Void Sale Equitably Confirmed by Judgment Debtors.

9. Where a sale of realty under execution did not vest title in the purchasers because there was no official record thereof, no order confirming it, and no deed delivered, the land being assessed thereafter to the purchasers, they and those claiming under them paying taxes, which the judgment debtors never did thereafter, and where such debtors waited 18 years, until the purchasers sued to quiet title, before claiming title designedly planning to delay until the statute of limitations barred any indebtedness of theirs before asserting title so as to recover the land free of the claims of creditors, the silence and acquiescence of the judgment debtors was an equitable confirmation of the void sale under execution, operating to validate what was in point of law no sale at all.

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a suit by W. R. Mascall and Annie Jackson against Alexander Murray, Jennie Murray, Adam Murray, William Murray and Malcolm Moody to quiet title to land which is referred to in the record as the Cupp ranch and is described as follows:

The southeast quarter of the northwest quarter, the east half of the southwest quarter and the southwest quarter of the southwest quarter, section 3, the east half of the northeast quarter of section 9, and the southeast quarter of the southeast quarter of section 4, in township 20 south of range 37 east of Willamette Meridian in Malheur County.

The land was owned by Alexander Murray, Adam Murray and William Murray as partners doing business under the firm name of Murray Bros. On April 29, 1891, the partners made an assignment for the benefit of their creditors, and on that day conveyed the above-described land, as well as other property, to Malcolm Moody as assignee, who qualified and duly accepted the trust. Thereafter, on June 13, 1891, pursuant to Section 7442, L. O. L., the creditors elected Kenneth McRae as assignee in lieu of Malcolm Moody,

who had been named by the debtors. The administration of the estate was not completed until 1899, when the final report of McRae was approved. Neither Moody nor McRae, while acting as assignee, attempted to sell or dispose of the land in dispute; both Moody and McRae acted on the assumption that the land involved herein had been sold at a sale on execution.

W. R. Mascall and Annie W. Jackson, on March 20, 1891, commenced an action at law in the Circuit Court for Grant County against Adam Murray, Alexander Murray and William Murray, as partners, for \$2,250, due on a promissory note, together with interest at the rate of 10 per cent per annum from October 1, 1889, \$250 attorney's fees and costs and disbursements. Summons and complaint were served upon Alexander Murray on March 24, 1891, in Grant County and on Adam Murray and William Murray on April 22, 1891. A writ of attachment was issued on March 20, 1891, and returned April 20, 1891, showing that the sheriff had levied on the land involved in the suit on April 6, 1891. The attorneys for the plaintiffs in the law action on April 20, 1891, filed a motion for a default judgment, and order of sale of attached property; and on the next day the clerk of the court, acting without an order from the judge and believing that Section 185, L. O. L., afforded sufficient authority, entered a judgment against the partners for \$2,600, the amount of principal and interest due on the note, \$250 as attorney's fees, costs and disbursements, and further ordered a sale of the attached property. The plaintiffs herein claim that an execution was issued on the judgment in the law action, and that thereafter they purchased the land at a sale on execution. There is no record evidence of sale or confirmation of sale, and there is no record in the clerk's office showing

that an execution was, at any time, returned, although after the title of the case a notation appears on the execution docket thus:

"1891, July 22; judgment for plaintiff, \$2,600.00; attorney's fees, \$225.00; costs and disbursements, \$88.89; this writ and return \$5.00, 1891, July 22; execution issued at instance of Parrish & Cozad."

The complaint filed in this suit alleges:

"That the plaintiffs are now and have been ever since 1891, the owners in fee and in the actual, open, notorious, exclusive, hostile and peaceable and adverse possession of"

—the described land; and in a separate paragraph it is averred:

"That the said plaintiffs are the owners in fee to the said premises, and that the said defendants claim an estate or interest therein adverse to the said plaintiff."

The Murrays filed an answer which, after certain denials and an admission that defendants claim an interest in the property, alleges affirmatively that the partners made an assignment for the benefit of their creditors and conveyed their property to Malcolm Moody as assignee; that Kenneth McRae was elected assignee by the creditors, and thereafter Moody was discharged by the court; that in 1899 McRae was discharged and the estate closed; that Moody did not, at any time, transfer the land to McRae, and the court did not make any order directing Moody to transfer the land to McRae; that neither Moody nor McRae sold or disposed of the real estate, and that since the estate is now closed, whatever remains undisposed of must be treated as a surplus; and that since the land is a part of the surplus and Moody as assignee holds

the record title he occupies the position of a trustee who is bound to reconvey to the Murrays. The answer concluded with a prayer that Moody be decreed to be the holder of the title to the premises in trust for the Murrays; that Moody be required to convey to the Murrays; that title in fee be decreed to rest solely in Alexander Murray, Adam Murray and William Murray; that title be quieted in the Murrays as against Malcolm Moody, the plaintiffs and all other persons whomsoever; that plaintiffs be decreed to have no title or interest in the property and for such other and further relief as to the court shall seem just and equitable. The reply of plaintiff, after certain denials and admissions, alleges the commencement of the law action, the attachment proceedings, and the rendition of the judgment, already mentioned; it is further averred that on or about June 22, 1891, an execution was issued on the judgment, and on August 1, 1891, the sheriff sold the land to plaintiffs and gave them a sheriff's certificate of sale; that immediately after such sale the plaintiffs entered into the actual possession of the premises, and have held the same continuously. Moody was made a party defendant and he filed an answer which is substantially the same as the reply of plaintiffs. The decree of the Circuit Court was for the plaintiffs, and the Murrays appealed.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief with oral arguments by *Mr. William H. Brooke* and *Mr. Ralph W. Swagler*.

For respondents there was a brief over the names of *Mr. J. E. Marks* and *Mr. Errett Hicks*, with an oral argument by *Mr. J. E. Marks*.

MR. JUSTICE HARRIS delivered the opinion of the court.

It will be observed that the plaintiffs in this suit held a promissory note signed by the Murrays, and that this note was reduced to the form of a judgment eight days before the partners made an assignment for the benefit of their creditors. The plaintiffs claim that an execution was issued on the judgment, and that thereafter they purchased the land at a sheriff's sale, received a certificate of sale, and took immediate possession. They take the position that their uninterrupted adverse possession has ripened into an absolute title. They also contend that long-continued acquiescence by the Murrays operates as an equitable confirmation of the sale, which will of itself debar the Murrays from asserting any interest in the property, even though the plaintiffs fail to establish adverse possession. The Murrays challenge both contentions of the plaintiffs, and after arguing that plaintiffs received nothing at the alleged sale on execution, the partners insist that Moody holds the title to the land as a trustee for them, and that therefore they are entitled to prevail.

1. Before proceeding with a discussion of the rights of the parties to the property it will be necessary first to dispose of debated questions arising from the pleadings. The complaint alleges that the possession of plaintiffs had been peaceable and hostile, and the defendants argue that the term "peaceable" conflicts with the word "hostile," and that such conflict in the meaning of the terms necessarily implies that the possession had not been hostile to the owner. The term "hostile" is used in the sense that the plaintiffs have been in possession as owners as distinguished from

one who holds in recognition of or in subordination to the true owner: 2 C. J. 122. The word "peaceable," as employed by the plaintiffs, merely means that their possession has been undisturbed and the continuity unbroken: 2 C. J. 168. It is therefore clear that there is no conflict in the significance of the words used in the complaint, and that this extremely technical objection to the pleading is without merit.

2. The Circuit Court denied a motion of the defendants to strike out the reply, and this ruling is assigned as error. The argument of the defendants proceeds upon the theory that, having alleged in the complaint that title had been consummated by adverse possession, the plaintiffs could not, in their reply, assert a title derived in any other manner or acquired from any other source. The reply does not, however, depart from the kind or quantity of title asserted in the complaint. The complaint alleges adverse possession, and the reply fortifies and strengthens the claims set forth in the primary pleading by alleging the facts concerning the action at law, the judgment, the sale on execution, and the receipt of a certificate of sale, and concludes by saying that immediately after the sale the plaintiffs entered into actual possession and have so held the land continuously. The reply only details the transactions relied on in support of the entry upon and holding of the land. The complaint and reply must be construed together, and when so considered one pleading does not vary from the other: *Pioneer Hardware Co. v. Farrin*, 55 Or. 590, 593 (107 Pac. 456); *Holmes v. Wolfard*, 47 Or. 93, 98 (81 Pac. 819); *Goodwin v. Tuttle*, 70 Or. 424, 430 (141 Pac. 1120).

3. The pleadings of both parties, however, have extended the scope of the inquiry beyond the single ques-

tion of adverse possession. The defendants cannot avail themselves of the fact that the plaintiffs were not in the actual possession of a part of the land at the time of the commencement of this suit because the Murrays have, by their answer, affirmatively asked for full and complete relief, and all the parties have submitted themselves to the jurisdiction of the court: *Moore v. Shofner*, 40 Or. 488, 493 (67 Pac. 511); *Bradtl v. Sharkey*, 58 Or. 153 (113 Pac. 653, 654); *Carroll v. McLaren*, 60 Or. 233 (118 Pac. 1034).

4, 5. In a suit to quiet title it is not necessary for the complaint to divulge the chain of title, or to reveal the probative facts, but it is sufficient if it appears from the pleadings that the plaintiffs own some substantial interest which is named, and the title may be shown in any manner authorized by law: *Zumwalt v. Madden*, 23 Or. 185 (31 Pac. 400); *Cooper v. Blair*, 50 Or. 394, 397 (92 Pac. 1074); *Savage v. Savage*, 51 Or. 167, 170 (94 Pac. 182). The allegation of ownership in fee was alone sufficient to enable proof of title by adverse possession: *Cooper v. Blair*, 50 Or. 394, 397 (92 Pac. 1074); *Mitchell v. Campbell*, 19 Or. 198 (24 Pac. 455); *Neal v. Davis*, 53 Or. 423, 435 (99 Pac. 69, 101 Pac. 212); *Stephenson v. Van Blokland*, 60 Or. 255 (118 Pac. 1026); *Smith v. Algona Lbr. Co.*, 73 Or. 1 (143 Pac. 921); *Hamm v. McKenny*, 73 Or. 347 (144 Pac. 435). The owner of an equitable as well as the possessor of a legal title may maintain a suit to determine all adverse claims affecting his interest: *Ladd v. Mills*, 44 Or. 224 (75 Pac. 141); *Holmes v. Wolfard*, 47 Or. 93, 98 (81 Pac. 819); *Kollock v. Bennett*, 53 Or. 395, 402 (100 Pac. 940, 133 Am. St. Rep. 840, 5 R. C. L., § 17, p. 649).

Referring again to the complaint, it will be noted that the plaintiffs assert that they have been in adverse possession of the premises, and then in a separate paragraph they assert that they are the owners in fee of the premises; and although the reply only explains the claim of adverse possession, and therefore harmonizes with the first pleading, nevertheless, in view of the pleadings as written by both parties when considered in connection with the relief asked for, the reply would not produce a variance even if construed as an assertion that an absolute title had been created by the sheriff's sale and the issuance of a certificate of sale. The complaint does not declare that the only title possessed by the plaintiff is that of adverse possession, but there is the broad and general allegation of fee-simple ownership set forth in a separate and distinct paragraph, and the averment of ownership as made in the reply cannot be successfully assailed by the objection urged by defendants.

6, 7. There is yet another phase of the case requiring attention. The complaint and reply both allege a legal title. The evidence fails to support the claim of adverse possession; the sale on execution did not confer an absolute title in fee simple, and at the most the proof supports an equitable title only. A suit to quiet title may sometimes end in complete failure merely because a legal title is alleged and an equitable title is proved, for the reason that proof of the latter constitutes a variance from the averment of the former kind of title; and fair examples of the rule and its application are afforded by *Hersey v. Lambert*, 50 Minn. 373 (52 N. W. 963); *Stewart v. Lead Belt Land Co.*, 200 Mo. 281 (98 S. W. 767); *Hebden v. Bina*, 17 N. D. 235 (116 N. W. 85, 138 Am. St. Rep. 700).

The principle that an equitable estoppel must be pleaded to make it available is firmly established in this jurisdiction, and is generally recognized (*Nickum v. Burckhardt*, 30 Or. 464 (47 Pac. 888, 48 Pac. 474, 60 Am. St. Rep. 822); *Union St. Ry. Co. v. First Nat. Bk.*, 42 Or. 606 (72 Pac. 586, 73 Pac. 341), the design of the rule being to prevent the assertion of the truth even (*Sabin v. Phoenix Stone Co.*, 60 Or. 378 (118 Pac. 494, 119 Pac. 724)). The doctrine requiring the pleading of an estoppel has a qualification, however, which exists in cases where an opportunity has not been presented for pleading the estoppel relied on, and if the estoppel is not pleaded because of the absence of opportunity, the equities may nevertheless be availed of: *Tieman v. Sachs*, 52 Or. 560 (98 Pac. 163); *Morback v. Young*, 58 Or. 135 (113 Pac. 22); *West Side Lbr. Co. v. Herald*, 64 Or. 210 (128 Pac. 1007, Ann. Cas. 1914D, 876); *Gladstone Lbr. Co. v. Kelly*, 64 Or. 163 (129 Pac. 763). The answer of the defendants challenged the title of plaintiffs by a general denial, and then for the affirmative defense relied on a recital of the assignment proceedings and the claim that Moody held the title to the property in trust for the Murrays. As a rule, a general denial does not afford to the plaintiffs an opportunity to assert an estoppel in a reply. The separate defense interposed by the defendants constitutes the basis for the affirmative relief sought by the defendants, and the truth of the assertion that the assignee did not sell or dispose of the land did not so affect or impinge upon the equities connected with and flowing from the sale of the land on execution as to require the plaintiffs to proclaim those equities in their reply, and therefore, if the facts are such as to constitute an equitable estop-

pel, the plaintiffs in this suit are not precluded from taking advantage of it; and, moreover, the conclusion arrived at is strengthened and supported by the fact that all the litigating parties have submitted themselves to the jurisdiction of a court of equity, and have asked for full and complete relief, thereby opening the door to a full inquiry: *Hunter v. Amish*, 164 Iowa, 397 (145 N. W. 877). All the parties to the controversy are actors, both the plaintiffs and defendants assert title, and both ask for complete relief, and, such being the situation, no good purpose can be subserved by denying to the plaintiffs the privilege of proving some title and then debar them from what rights they in fact have merely because they have been so bold as to plead a greater title. It must be borne in mind that all parties are in a court of equity seeking a form of relief the character of which is the same both in quality and quantity. Permission to prove an equitable title under an allegation of a legal title in a situation analogous to the instant case is aptly illustrated in *Van Vranken v. Granite County*, 35 Mont. 427 (90 Pac. 164); *Oliver v. Dougherty*, 8 Ariz. 65 (68 Pac. 553). See, also, *Glasmann v. O'Donnell*, 6 Utah, 446 (24 Pac. 537).

8. The plaintiffs have failed to prove adverse possession of all the land known as the Cupp ranch for the period of time necessary to confer an absolute ownership; and, although the defendants suggest that they held the property adversely during a period of 10 years subsequent to the sale on execution, they have likewise failed to sustain the intimation. There is no official record of the sale; apparently the execution was not returned, no order was made confirming the sale, and no deed was delivered, although a certificate

of sale was given to the plaintiffs herein; and therefore the legal title remained in the judgment debtors, and the sale by the sheriff did not, of itself, have the effect of conveying a fee-simple title even if it be assumed that such sale was regular in all respects: *Faull v. Cooke*, 19 Or. 455 (26 Pac. 662, 20 Am. St. Rep. 836); *Kaston v. Storey*, 47 Or. 150 (80 Pac. 217, 114 Am. St. Rep. 912).

9. Since the sale on execution did not operate to convey an estate in fee, it remains to be seen whether the plaintiffs have acquired any equitable interest which a court of equity will recognize as being equivalent to an absolute ownership; and in the consideration of this question the attempted sale by the sheriff will be treated as an utterly void proceeding, and not simply as voidable or erroneous. There is ample proof that the sheriff went through the form of a sale on execution at some time in the summer of 1891; Mascall bid in the property for the plaintiffs for \$3,104, the full amount of the judgment, with costs, and a certificate of sale was issued to the successful bidder. After keeping the certificate of sale for some time Mascall sent it to his attorneys, with directions to do whatever was necessary to be done. No steps were taken to secure a confirmation of the sale or the execution of a deed; and the certificate received by the attorneys was lost or destroyed. The land was not assessed to the Murrays after 1891, but was assessed to Mascall, or a person claiming under him. The plaintiffs and those claiming under them paid the taxes each year, and the defendants neither paid nor offered to pay any taxes whatever after March, 1891. Malcolm Moody, as assignee, on November 9, 1891, filed a report with the clerk of the court, showing that

the Cupp and Z. Smith ranches had been sold to satisfy the judgment obtained by Mascall and Jackson, and thereafter the report was approved. Kenneth McRae filed a report as assignee on June 3, 1893, which recited that:

"The assignee would respectfully ask that the court confirm the sale of the Cupp and Zack Smith ranches in Malheur County, sold to W. R. Mascall at sheriff's sale at Vale, August 29, 1891. The assignee has corresponded with most possible buyers, but can get no offer that will justify him in redeeming said lands."

In his final supplemental report and petition for discharge as assignee McRae stated that:

"The Zack Smith ranch and the Cupp ranches situated in Malheur County and valued in said inventory at \$4,000 was sold on execution to satisfy the Mascall and Jackson judgment."

In 1904, Oscar Hill made a contract with Mascall for the purchase of the Cupp ranch and entered upon and took actual possession of the greater part of the premises; at the time Hill moved on the land the fences were down, and the land was practically open range; Hill built fences and inclosed about 125 acres; the Murrays knew that he had moved on the Cupp ranch, and did not notify him to leave. The plaintiffs thought they owned the land, and claimed ownership. The partners knew that the plaintiffs obtained a judgment; that the land had been attached; that Mascall claimed the land "a long, long time ago"; and that Mascall had sold a part of the property a "long time ago." Adam Murray testified that five or six or seven or eight years prior to 1912 he consulted an attorney with reference to taking steps to clear up any clouds on the title of the lands mentioned herein, and was advised

to wait until 10 years had elapsed after the closing of the assignment proceedings. This suit was commenced by the plaintiffs on April 2, 1909, and not until after that time did the Murrays make an avowal of any right to the land; they waited 18 years before openly claiming any title to the litigated premises; they not only remained silent, but designedly waited for the express purpose of taking advantage of the statute of limitations as a bar against any unpaid indebtedness whenever the necessary time had run, with the expectation of paying their debts with time only and of recovering the land freed from the claims of others. Although the sale on execution may be regarded as an utterly void proceeding, which is without vitality when considered alone, nevertheless a court of equity, under the circumstances narrated herein, will deem the conduct, silence and acquiescence of the debtors as an equitable confirmation which operates to make a good sale out of a transaction which, standing by itself, was in contemplation of law no sale at all; and this equitable principle as defined and applied here is fortified by an impregnable bulwark of authority: *Fallon v. Worthington*, 13 Colo. 569 (22 Pac. 960, 16 Am. St. Rep. 231, 6 L. R. A. 708); *McGinnis v. Caldwell*, 71 W. Va. 375 (76 S. E. 834, 43 L. R. A. (N. S.) 630); *Tipton v. Powell*, 2 Cold. (Tenn.) 22; *Smith v. Wert*, 64 Ala. 34; *Gowan v. Jones*, 10 Smedes & M. 164; *Smith v. Warden*, 19 Pa. 424; *Maple v. Kussart*, 53 Pa. 348 (91 Am. Dec. 214); *McConnell v. People*, 71 Ill. 481; *Spragg v. Shriver*, 25 Pa. 282 (64 Am. Dec. 698); *Tooley v. Gridley*, 3 Smedes & M. 493 (41 Am. Dec. 628); *Redus v. Hayden*, 43 Miss. 614; *Shivers v. Simmons*, 54 Miss. 520 (28 Am. Rep. 372; 5 R. C. L., § 43, p. 671); *Freeman*, Void Jud. Sales,

§ 50; Rorer, Jud. Sales, § 13. The defendants have not offered to reimburse the plaintiffs for the taxes paid, and have not in any way offered to do equity: 32 Cyc. 1355.

On the record as made by the parties, the defendants cannot successfully assert any claim to the land, and the decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

Denied July 6, 1915.

ON PETITION FOR REHEARING.

(149 Pac. 521.)

Mr. William H. Brooke and Mr. Ralph W. Swagler,
for the petition.

Mr. J. E. Marks and Mr. Errett Hicks, contra.

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

Counsel for appellants in their petition for a rehearing have presented a very interesting and able argument in behalf of their contention, but after a careful review of the matter we see no reason for changing our views as expressed in the opinion of the court. The petition is therefore denied.

REHEARING DENIED.

Argued May 6, affirmed June 8, rehearing denied July 6, 1915.

GILKEY v. MURRAY.

(149 Pac. 521.)

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is a suit by Allen Gilkey and Angie Gilkey, substituted as plaintiffs for James M. Sweitzer and Etta Sweitzer, against Alexander Murray, Jennie Murray, Adam Murray, William Murray and Malcolm Moody to quiet title to land known as the Zack Smith ranch, described as follows:

The southwest quarter of the southeast quarter of section 15, and the north half of the northeast quarter and the southwest quarter of the northeast quarter of section 22 in township 19 south, range 37 east, Willamette Meridian, in Malheur County.

Except as to the description of the land the pleadings tell the same stories that are narrated in *Mascall v. Murray*, and the facts are identical with the last-mentioned case, except that in the instant controversy actual possession by the Gilkeys and their predecessors is more pronounced and extends over a longer period of time. The Zack Smith ranch was attached in the same action at law, was included in the same sale on execution, and was covered by the same certificate of sale. The only difference between the two cases is found in the circumstances of the possession and use of the land after 1891. The Circuit Court decreed that Allen Gilkey and Angie Gilkey were the owners of the land, and the Murrays appealed.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief with oral arguments by *Mr. William H. Brooke* and *Mr. Ralph W. Swagler*.

For respondents there was a brief over the names of *Mr. J. E. Marks* and *Mr. Errett Hicks*, with an oral argument by *Mr. Marks*.

MR. JUSTICE HARRIS delivered the opinion of the court.

Mascall and Jackson rented the Zack Smith ranch to A. J. Whisman in 1894. When Whisman took possession of the land the fences were down; he repaired the fences, and after living there about three years he sold his interest to Joe Juaquin, who lived on an adjoining ranch. Juaquin took the crops and used the premises about one year. W. R. Mascall and Annie Jackson, on September 1, 1899, deeded the Zack Smith ranch to Henry A. Smith, who on July 9, 1906, conveyed it to James M. Sweitzer, who in turn transferred the property to Allen Gilkey and his wife, Angie Gilkey, by a deed dated May 12, 1909. In the order already mentioned each grantee lived on the premises until making a conveyance to his successor, and the Gilkeys were still in possession at the time of the trial. The Murrays did not, at any time after 1891, have the actual possession of any part of the Smith ranch, although in the winter of 1901, referred to as the "hard winter," the Murrays bought and hauled some hay from the Thompson ranch and fed it on the Zack Smith ranch to some sheep, which they kept there about two months, probably with the consent and permission of Henry A. Smith, who was living on the place at the time. The Murrays knew that

the Gilkeys and their predecessors claimed to own the land, and the defendants did not assert any claim to the premises until the commencement of this suit. While the continuity of the possession was debated, it being claimed that there was a break between the departure of Whisman and the coming of Henry A. Smith, still the evidence inclines much more strongly toward the conclusion that the possession was uninterrupted; but even if there was an absence of continuity, the principles announced and applied to the cognate case of *Mascall v. Murray*, ante, p. 637 (149 Pac. 517), govern and control the decision of the instant controversy, with the result that the decree of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

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Action—Forms of Action—Statutory Provisions.

2. Though under Section 1, L. O. L., providing that the distinction theretofore existing between forms of actions at law is abolished, and that there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs, forms of action have been abrogated, the substance of the common-law actions remains. (*Watkins v. Record Photo. Abstract Co.*, 421.)

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2. An actual adverse holding of land for 25 years ripens into title. (*School District No. 5 v. Neder*, 552.)

Adverse Possession—Pleading—"Hostile"—"Peaceable."

3. Where the complaint, in suit to quiet title secured by adverse possession, alleged that such possession had been "peaceable" and "hostile," there was no such conflict in the meaning of the terms as implied that the possession had not been hostile to the owner, since "hostile" meant that the plaintiffs had been in possession as owners as distinguished from one holding in recognition of or in subordination to the true owner, while "peaceable" meant that their possession had been undisturbed and its continuity unbroken. (*Mascall v. Murray*, 637.)

Adverse Possession—Pleading—Issues.

4. In a suit to quiet title, an allegation of ownership in fee was sufficient to admit proof of title by adverse possession, since in such a suit it is not necessary for the complaint to divulge the chain of title or reveal probative facts; it being sufficient if the pleadings allege and name a substantial interest in the plaintiffs. (*Mascall v. Murray*, 637.)

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Appeal and Error—Presumptions in Support of Judgment.

2. On an appeal from an order allowing disputed items of costs where there was nothing to show the incorrectness of certain items, they would be allowed to stand, as error would not be presumed. (*Cunningham v. Friendly*, 16)

Appeal and Error—Findings of Court—Effect in Equitable Actions.

3. Where the evidence in an action to cancel a note and mortgage was in conflict, the findings of the trial judge were entitled to great weight. (*Nye v. Lincoln County Bank*, 38.)

Appeal and Error—Questions Reviewable—Bill of Exceptions.

4. Section 171, L. O. L., as amended in 1913 (Laws 1913, p. 651), providing for the certification of the entire testimony as a bill of exceptions, applies only to cases involving consideration of motions for nonsuit or directed verdict, and any other question of fact in an action at law will not be considered without a bill of exceptions. (Smith v. Walters, 76.)

Appeal and Error—Finding—Conclusiveness.

5. A finding sustained by evidence is controlling on appeal. (State on Inf. v. Johnson, 85.)

Appeal and Error—Grounds of Review—Presentation in Lower Court.

6. In an equity suit, where defendants made no showing that they were misled by the statement of facts in the reply, the fact that the reply was a departure from the complaint is no ground for reversal. (Wiley v. Whitney, 92.)

Appeal and Error—Equitable Relief—Presumptions.

7. The court, in a suit against a city to remove a cloud from title and to enjoin enforcement of a judgment condemning land of plaintiff, must, in the absence of a bill of exceptions in the condemnation action, assume that testimony was received on the issues of necessity for taking, and inability of the parties to agree on compensation, constituting conditions precedent to maintenance of eminent domain proceedings. (Skelton v. Newberg, 126.)

Appeal and Error—Judgments Appealable—Default Judgment.

8. While an appeal will lie from a void decree when taken by default, it will not lie from one which is merely voidable or erroneous. (Oregon Lumber & Fuel Co. v. Hall, 138.)

Appeal and Error—Appealable Orders—Overruling Demurrer.

9. In a suit to restrain a town from constructing a waterworks system, in which the complaint alleged that the town had not complied with the requirements of the charter that it should first attempt to acquire the existing private systems by arbitration, and the answer alleged that the town had complied with such requirements, an order overruling a demurrer to the answer left the issue of fact undisposed of, and was not final, and not appealable under Section 548, L. O. L., providing that orders which affect a substantial right, and, in effect, determine the action, shall be, for the purpose of review, deemed judgments or decrees. (Birkemeier v. Milwaukie, 143.)

Appeal and Error—Dismissal of Appeal—Dissolution of Injunction.

10. Where complainant appealed from an order overruling a demurrer to the answer and dissolving a temporary injunction, and the only relief asked was an injunction to restrain a town from constructing a waterworks system in alleged violation of its charter provisions, so that, if the temporary injunction was dissolved, the suit would be practically terminated, the appeal from the order would not be dismissed on defendant's motion before the final hearing. (Birkemeier v. Milwaukie, 143.)

Appeal and Error—Proceedings—Lack of Jurisdiction—Dismissal.

11. Where lack of jurisdiction of an appeal is disclosed by the appellant's failure to give a proper notice of the appeal within the time limited to file a proper undertaking or to send up a transcript, the appeal must be dismissed. (*Proctor v. Jeffery*, 151.)

Appeal and Error—Proceedings—Assignment of Error—Failure to Include—Effect.

12. Where an abstract on appeal failed to contain assignment of errors, such assignment not being essential to transfer of the cause, its omission was not ground for dismissal, and appellant would be permitted to include it by amendment. (*Proctor v. Jeffery*, 151.)

Appeal and Error—Scope of Review—Pleadings.

13. Where an appeal is taken by defendants, they may contest the sufficiency of the complaint for want of facts without filing a bill of exceptions. (*Proctor v. Jeffery*, 151.)

Appeal and Error—Proceedings to Transfer Cause—Time for Proceedings.

14. In a receivership proceeding, an appeal taken June 4th, from a decree entered on April 6th, in favor of petitioning holders of receiver's certificates, authorizing the receiver to apply to the United States District Court, in which bankruptcy proceedings were pending, for leave to sell property, was in time, under Laws of 1913, pages 617, 618, authorizing an appeal within 60 days from the entry of the judgment, decree, or order appealed. (*Stacy v. McNicholas*, 167.)

Appeal and Error—Decisions Reviewable—Default Decree.

15. In a suit for the appointment of a receiver, a decree upon the petition of holders of receiver's certificates, which petition was contested by the trustee and bankruptcy of the former owner, is not a decree by default for the purposes of review. (*Stacy v. McNicholas*, 167.)

Appeal and Error—Motion to Dismiss—Review—Scope and Extent.

16. Under Section 558, L. O. L., providing that the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from, the question whether orders, made more than 60 days prior to the notice of appeal from the decree, to which error is assigned, can be considered will not be determined on a motion to dismiss the appeal. (*Stacy v. McNicholas*, 167.)

Appeal and Error—Harmless Error—Erroneous Rulings on Pleadings.

17. Where the relation between plaintiff, suing for a personal injury, and defendant, was that of passenger and carrier, the striking out of defendant's plea of the Workmen's Compensation Act was not prejudicial. (*Susznik v. Alger Logging Co.*, 189.)

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.

18. Where witnesses competent to testify testified that a street-car was running at from 15 to 18 miles an hour, error in permitting witnesses to testify that the car was traveling faster than the ordinary rate was not prejudicial. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.

19. Where, in an action for injuries in a collision with a street-car, the court charged that, at the time of the accident, an ordinance fixed the maximum speed of cars at 25 miles per hour, and that it was not unlawful to run cars within 25 miles per hour, error in admitting a repealed ordinance, limiting the speed to 12 miles per hour, was not prejudicial. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Appeal and Error—Record—Filing Transcript.

20. Under Section 554, L. O. L., as amended by Laws of 1913, page 618, providing that if a cause is one on appeal to the Supreme Court which the law requires to be submitted at Pendleton, the transcript and abstract shall be filed with the deputy clerk of the court at Pendleton, and Sections 896-898, L. O. L., providing that the clerk of the Supreme Court shall, with the consent of the court, appoint a deputy at Salem and one at Pendleton, and that the clerk shall attend each session at Pendleton unless excused by the court, the filing of the transcript with the clerk instead of the deputy clerk at Pendleton in a cause to be heard at Pendleton, is sufficient to give the Supreme Court jurisdiction. (*Central Oregon Irr. Co. v. Whited*, 255.)

Appeal and Error—Findings—Conclusiveness.

21. A finding on conflicting testimony of witnesses appearing before and personally known to the court will not be disturbed on appeal. (*Weber v. Richardson*, 286.)

Appeal and Error—Review—Action in Lower Court.

22. Where, in an action for an accounting under an agreement to divide the cost of erecting a building, an architect was by consent appointed to determine the actual cost of erection, and defendant's motion for an order to allow the introduction of evidence, if appraisal was unsatisfactory, was denied, the court on appeal cannot review the denial of the motion; defendant not appearing at the hearing at which the witness gave his testimony, and no offer being made to introduce other evidence, though the court had no power to make the testimony of the architect final. (*Toomey v. Casey*, 298.)

Appeal and Error—Presentation of Grounds of Review in Court Below—Necessity.

23. Improper argument of counsel cannot be reviewed where there was no exception below to the ruling of the court thereon. (*Madden v. Condon Nat. Bank*, 363.)

Appeal and Error—Review—Erroneous Reasoning.

24. An appellate court will affirm a correct decision of the trial court, though based on erroneous reasoning. (*Bohart v. Parker*, 371.)

Appeal and Error—Error Affecting Party not Entitled to Succeed.

25. Where plaintiff in replevin cannot recover because showing no right of immediate possession, he cannot complain of the action of the trial court in ordering a return of the property to one who had no right thereto. (*Bohart v. Parker*, 371.)

Appeal and Error—Review—Equity Cases.

26. An equity suit is triable *de novo* on appeal; and hence the disqualification of the trial judge will not prevent the appellate court from reviewing the case. (*Henderson v. Tillamook Hotel Co.*, 379.)

Appeal and Error—Record—Authentication—Sufficiency.

27. A transcript purporting to be a rehearsal of the proceedings at trial, certified only by the official reporter and not even in the form for a bill of exceptions, cannot be considered on appeal. (*Hobson v. O'Connor*, 394.)

Appeal and Error—Transcript—Jurisdiction.

28. An appellant was not entitled to file a transcript or abstract until the expiration of the time to except to the sureties on the undertaking, so that the filing of the transcript before the expiration of such time was premature, and gave the Supreme Court no jurisdiction. (*Graf v. Percy*, 488.)

Appeal and Error—Undertaking—Substitution.

29. Under Section 268, L. O. L., allowing defendant ten days to give the plaintiff notice of the justification of bail, and that in case other bail is given there shall be a new undertaking in the form and to the effect prescribed in Section 262, if the first undertaking is insufficient, the appellant must first get leave of court to file a new undertaking. (*Graf v. Percy*, 488.)

Appeal and Error—Time for Appeal—Statutory Provisions.

30. Where a judgment was rendered on January 10, 1913, and the time for taking the appeal under the law then in force would expire on June 10th of that year, the time was extended by Session Laws of 1913, page 617, which went into effect June 3d, and which provided that, where the right to appeal existed at the time the act went into effect, the time should be extended for 60 days thereafter. (*Walling v. La Follette*, 497.)

Appeal and Error—Affirmance Without Prejudice—Constitutional Provisions.

31. Notwithstanding error in not predicating the case upon the Employers' Liability Act, and in view of Article VII, Section 3, of the Constitution, providing that, if the judgment appealed from was such as should have been rendered, it shall be affirmed notwithstanding any error, committed during the trial, the judgment of the Circuit Court finding that a servant's release of damages for the injury was not procured by fraud will be affirmed without prejudice to his right to sue to cancel the release. (*Neilsen v. Portland Gas & Coke Co.*, 505.)

Appeal and Error—Harmless Error—Instructions.

32. In an action for assault, where the testimony and instructions showed that the jury clearly understood which of two assaults was relied upon for recovery, the refusal to instruct that a second assault could not be so relied upon was not prejudicial error. (*Housman v. Peterson*, 556.)

Appeal and Error—Review—Amount of Damages—Remittitur.

33. A judgment for damages for assault and battery will not be reversed for an erroneous submission of expenses for medical treatment, where the amounts claimed were definite and could easily be eliminated from the recovery. (*Housman v. Peterson*, 556.)

Appeal and Error—Record—Time for Filing—Evidence.

34. Under Laws of 1913, page 619, providing that the trial court or the judge thereof, or the Supreme Court or a justice thereof, may enlarge the time for filing the abstract, but that the order shall be made within the time allowed to file the transcript, an order extending the time for filing the transcript may be entered before the undertaking on appeal has been filed. (*Vincent v. First Nat. Bank*, 579.)

Appeal and Error—Record—Transcript—Sufficiency.

35. Under Laws of 1913, page 656, providing that when an appeal is perfected the original proceedings and original bill of exceptions shall be sent to the clerk of the Supreme Court, a transcript, including the original bill of exceptions but omitting certain motions, summons and other papers, is sufficient; the respondent being entitled to have the remaining papers brought up if desired. (*Vincent v. First Nat. Bank*, 579.)

Appeal and Error—Presenting Questions in Lower Court—Necessity of Exceptions.

36. Where the bill of exceptions does not show that any exception was taken to any ruling at the trial or to the findings, the Supreme Court cannot consider the correctness of the ruling or the sufficiency of the evidence to sustain the finding. (*Cassidy v. Wilson*, 595.)

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1. Under Section 1932, L. O. L., declaring that if any person shall willfully and maliciously burn, in the night-time, any barn of another, he shall be guilty of arson, the indictment must allege the owner of the barn as part of the description of the offense. (*State v. Moyer*, 396.)

ASSAULT AND BATTERY.**Assault and Battery—Trial—Instructions.**

1. In an action for assault, where the court instructed that recovery for expenses incurred for medical services is known as compensatory damages, that, if the jury should find any sum expended by plaintiff for such attendance, he should be allowed the amount, and that there was no testimony, however, as to the amount of doctor's bills, and also charged that if a person wantonly assaults another without provocation the jury may allow punitive damages, and that if such is the case it is within the jury's discretion, in addition to compensatory damages for nursing and medical attendance, to allow damages by way of punishing defendant, a refusal to instruct that plaintiff could not recover for medical services be-

cause no evidence was offered as to the value thereof was erroneous, since the reiteration by the court of the statement that the jury might find in plaintiff's favor for medical service was likely to mislead the jury. (*Housman v. Peterson*, 556.)

Assault and Battery—Provocation—Reduction of Compensatory Damages.

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1. In an action by a bank on a note, of which it was the original payee, given for the purchase price of stock, where the sale had been effected by agents acting for the bank and for the corporation whose stock was sold, they having represented that the corporation was a rich concern and backed by the bank, and that it had a large amount of goods in warehouse when it had, in fact, no property, money, or credit, a good defense was presented to the bank's suit; it not being a holder in due course, under Section 5885, L. O. L., defining who is a holder in due course, and absence or failure of consideration being a matter of defense against any person not a holder in due course by direct provision of Section 5861. (*Bank of Gresham v. Walch*, 272.)

Bills and Notes—Want of Consideration—Burden of Proof.

2. By the negotiable instruments law the burden of showing want of consideration rests upon the defendant sued on a note, and, if he offers any evidence on the head, the plaintiff must show consideration by a fair preponderance of the evidence. (*Bank of Gresham v. Walch*, 272.)

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1. To recover for work and labor performed at the oral request of the defendant in selling land for him, it must be shown, not only that the defendant requested the performance of the service before Section 808, L. O. L., was amended by Act of 1909, page 69, so as to require an agreement, thereafter made, to sell real estate on commission to be in writing, and forbidding the introduction of any evidence thereof except the writing, but also that the plaintiff performed the services prior to that time, since there was no obligation to pay for them until they were performed. (*Taylor v. Peterson*, 77.)

Brokers—Compensation—Necessity of Written Contract—Full Performance.

2. The full performance by a broker of an oral contract to sell land for another on commission does not take the contract out of the statute of frauds, Section 808, L. O. L. (*Taylor v. Peterson*, 77.)

Brokers—Commissions—Action—Proof.

3. In an action for broker's commission, proof that the broker, who admittedly had no exclusive agency, offered the property to the city, and that the city thereafter purchased it, is not sufficient to entitle him to a commission, since it fails to show either that he secured the execution of a binding contract for the sale, or that he and not another was the means of bringing the parties together. (Taylor v. Peterson, 77.)

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Cancellation of Instruments—Evidence to Justify Relief.

2. To justify the cancellation of a note and mortgage on the ground that the instruments had been given as a matter of accommodation, and not to operate in their apparent character, the evidence must be clear and convincing. (Nye v. Lincoln County Bank, 38.)

CARRIERS.**Carriers—Injuries to Passengers—Existence of Relation—Issues.**

1. Where the complaint, in an action for a personal injury, alleged that the relation of passenger and carrier existed between plaintiff and defendant at the time of the accident causing the injury, defendant could plead and prove that the relation of master and servant existed, and that plaintiff must resort to the relief afforded by the Workmen's Compensation Act. (Susznik v. Alger Logging Co., 189.)

Carriers—Master and Servant—Passengers—Existence of Relation.

2. Plaintiff visited an office of defendant, seeking employment, and was directed by the person in charge thereof to go to defendant's camp near a designated town to begin work. When he reached the town, he went to defendant's logging train, and was there directed by the engineer to place his baggage on the pilot of the engine and get aboard. He rode on the pilot to the logging camp. Before leaving the immediate vicinity of the train, he was injured. He did not do any work or receive any compensation from defendant prior to

the accident. *Held*, that the relation between the parties was that of passenger and carrier, and not of employee and employer, within the Workmen's Compensation Act. (*Susznik v. Alger Logging Co.*, 189.)

Carriers—Injuries to Passengers—Contributory Negligence.

3. An answer, in an action for injury to a passenger, which alleges that plaintiff was transported by defendant on its logging train gratuitously solely for the benefit of plaintiff and defendant in connection with the business in which defendant was engaged, and that plaintiff, on reaching his destination, ran in front of the engine and was injured, sets forth plaintiff's contributory negligence, though it does not admit any negligence of defendant. (*Susznik v. Alger Logging Co.*, 189.)

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1. Where a franchise is given to an electric company by an ordinance and is accepted by the company and acted on by it and its successor, an executed contract is constituted which cannot be altered without the consent of both parties. (*Town of Haines v. Eastern Oregon L. & P. Co.*, 402.)

Constitutional Law—Due Process of Law—Separate Property—Liability for Homestead Goods.

2. Where a creditor, to whom a husband had given a note representing his liability for household goods, sought to enforce against the wife her joint liability with the husband for such expenses under Section 7039, L. O. L., by levying execution upon the wife's homestead estate under judgment against the husband alone in an action on his note, the attempt was in contravention of the organic law, which guarantees to a citizen the right of trial by jury before he or she may be deprived of property, unless the wife's realty was fraudulently conveyed to her by her husband. (*Dale v. Marvin*, 528.)

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1. Generally, a receiver of an insolvent corporation should not be appointed without notice to the parties affected and before they have an opportunity to be heard, though the statute does not require notice, for the rules of equity which govern, when not inconsistent with the statute, require notice. (*Stacy v. McNicholas*, 167.)

Corporations—Receivers—Ex Parte Appointment—Acquiescence.

2. A defendant may waive an objection to an ex parte appointment of a receiver by acquiescence by failing to interpose a timely objection or by participating in the proceedings after the appointment. (*Stacy v. McNicholas*, 167.)

Corporations—Receivers—Ex Parte Appointment.

3. A receiver of a corporation was appointed without notice. The holder of the property as trustee appeared and answered in the suit in which the receiver was appointed and asserted that a mortgage was a first lien on the property. He participated in other proceedings. He objected to the receiver operating the business of the corporation and to the making of the expenses of operating a lien prior to the mortgage, but he did not object to the appointment of the receiver. *Held*, that since under Section 392, L. O. L., the trustee could, without joining his beneficiary, maintain a suit, the parties interested acquiesced in the appointment of the receiver without notice. (*Stacy v. McNicholas*, 167.)

Corporations—Receivers—Appointment—Jurisdiction of Court.

4. A court of equity has no inherent power to appoint a receiver of an insolvent corporation, and has no jurisdiction to appoint a receiver, except as ancillary to an actual pending suit against the corporation. (*Stacy v. McNicholas*, 167.)

Corporations—Actions Against Officers—Instructions.

5. The president of a corporation, who was commissioned to acquire land, induced defendant to take title in his own name, to mortgage it, and to execute a conveyance to him which did not mention the mortgage and recited an inflated consideration. The president then transferred the property to corporation for an exorbitant price. Thereafter the corporation sued defendant and the president to recover damages for fraud, and the jury was charged that if the president of the corporation attended to practically all of its affairs, and that in all the dealings with defendant he was acting in his official capacity, the corporation is charged with knowledge of all acts and things done by the president, and could not complain of his conduct, but that if he was acting personally for himself, it was not charged with knowledge. *Held*, that while the instructions should be considered as a whole, it was erroneous in allowing the jury to believe that the corporation was charged with notice of the president's act, provided he was acting for it, though intending to overreach his principal. (*Saratoga Inv. Co. v. Kern*, 243.)

Corporations—Corporate Officers—Notice.

6. While a principal is charged with notice of facts known to his agent, save where it is the duty of the agent not to disclose, or his interest is adverse to his principal, a corporation is charged with the knowledge of one of its officers, who, though acting for himself, was at the same time the sole representative of the corporation. (*Saratoga Inv. Co. v. Kern*, 243.)

Corporations—Notice to Officers—Effect.

7. The rule that notice to the president of a corporation is notice to it does not apply when the officer acts for himself and adversely to

the corporation, in which case his knowledge is not imputed to the corporation. (Weber v. Richardson, 286.)

Corporations—Receivers—Appointment—Right to.

8. Though accountants appointed to audit books of a corporation were agreed to by the defendant officers, the wrongful refusal of such officers to compensate them is no ground for appointment of a receiver of the corporation. (Henderson v. Tillamook Hotel Co., 379.)

Corporations—Receivers—Appointment—Grounds.

9. Where the patronage of a hotel had been practically the same since it started in business, the directors and managers should not be removed and a receiver appointed, even though the conduct of the president, who was in active charge of the business, had been open to criticism on account of his intoxication; it not appearing that the corporation was in immediate danger of insolvency, or that the president was falsifying or failing to keep records of its business. (Henderson v. Tillamook Hotel Co., 379.)

Corporations—Use of Corporate Property—Power of President.

10. The president and manager of a hotel corporation should not use the liquor of the company or its funds in treating himself, guests and others, though he justified it on the ground of advertising. (Henderson v. Tillamook Hotel Co., 379.)

Corporations—Specific Performance—Stock Subscription—Failure to Deliver Stock—Remedies.

11. A party who has advanced money on account of the purchase of corporate stock which is not delivered to him may sue for specific performance or for his damages occasioned by the breach, or he may rescind the contract and sue in *assumpsit* for the recovery of the sum paid as money had and received. (Watkins v. Record Photo. Abstract Co., 421.)

CORROBORATION.

See Criminal Law, 1.

COSTS.

Costs—Taxation—Bill of Costs—Verification.

1. The attorney for a party entitled to costs had a right to verify the cost bill. (Cunningham v. Friendly, 16.)

Costs—Taxation—Bill of Costs—Service.

2. The objection that a cost bill was not properly served was waived by appearing and objecting to the bill. (Cunningham v. Friendly, 16.)

Costs—Items Recoverable—Costs on Appeal.

3. Where a judgment was reversed and the costs in the court below awarded to defendant, he was not entitled to tax a clerk's fee incurred in taking the appeal. (Cunningham v. Friendly, 16.)

Costs—Costs on Appeal—Expense of Extending Testimony.

4. Where on appeal a party procured an original and two copies of the testimony as extended, he could not charge for the copies in

his cost bill, though he may have needed them. (Cunningham v. Friendly, 16.)

Costs on Appeal—Losing Party.

5. In a suit against defendant to enjoin him from breaking plaintiff's water-gates and taking more water than he was entitled to, where defendant's interest was but a small part of the matter involved, it would be inequitable for defendant suffering an adverse judgment to bear the costs. (Central Oregon Irr. Co. v. Whited, 255.)

Costs—Costs on Appeal—Suits in Equity—Transcript.

6. The Supreme Court will tax as a disbursement the necessary expense incurred for a transcript of the testimony in a suit in equity, when such transcript is prepared for the appeal, and after a decision by the trial court. (Henderson v. Tillamook Hotel Co., 379.)

Costs—Costs on Appeal—Expense of Transcript.

7. One who successfully appeals from a judgment in an action at law may not have the expense of transcribing the testimony taxed as a disbursement in the appellate court. (Delovage v. Old Oregon Creamery Co., 430.)

Costs—Costs on Appeal—Expense of Transcript.

8. The rule that expenses incurred by an appellant in a law case in procuring a transcript must be taxed below as costs, and cannot be so taxed on appeal, is not changed because under Article VII, Section 3 of the Constitution, as amended in 1910, "either party may have the whole testimony attached to the bill of exceptions," thus transmitting the transcript to the appellate court on appeal. (Delovage v. Old Oregon Creamery Co., 430.)

See Quo Warranto, 2, 3, 4.

COURTS.

Remarks and Conduct of Judge During Trial.

See Criminal Law, 3.

See Trial, 4, 6.

CREDITORS.

See Fraudulent Conveyances, 9.

CRIMINAL LAW.

Criminal Law—Instructions—Accomplices—Corroboration.

1. A charge that the evidence, aside from the testimony of an accomplice, must show defendant's connection with the commission of the crime is correct, though it does not include the provision of Section 1540, L. O. L., that corroboration is not sufficient if it merely show the commission of a crime. (State v. Canton, 51.)

Criminal Law—Harmless Error—Admission of Evidence.

2. In a prosecution for larceny of cattle, the admission of evidence that defendant, when asked what he had been doing up around where the cattle were stolen, replied that he was doing nothing up there, but just riding around, the admission of such testimony was immaterial and not prejudicial error. (State v. Gulliford, 231.)

Criminal Law—Trial—Remarks of Court.

3. In a prosecution for larceny of cattle, defendant's attorney stated that his client had admitted a previous conviction, and the court replied: "The defendant still seems to have doubt in his mind." After defendant had commented upon the situation in regard to such conviction, the court further said: "The record shows the defendant pleaded guilty to the larceny of animals, a felony, and was paroled from this court." *Held*, that the court's language was not improper, as giving undue prominence to the previous conviction. (*State v. Gulliford*, 231.)

Criminal Law—Appeal—Reservation of Ground of Review—Character of Crime.

4. In a prosecution for larceny of cattle, where the court charged on such crime, the defendant neither excepting to the charge nor requesting further instructions as to the distinction between the crime of driving cattle from the range and larceny, the question whether the proof called for such instructions was not presented for review. (*State v. Gulliford*, 231.)

CROSS-BILL.

See Action, 1.

CUSTODY OF CHILDREN.

See Divorce, 1.

DAMAGES.**Recovery by Father for Death of Son.**

See Death, 1-3.

DEATH.**Death—Employers' Liability Act—Recovery by Father.**

1. Under Employers' Liability Act, Section 4, father of an employee killed in service, who left no widow, lineal heirs, adopted children, or mother, had right to maintain an action for the death. (*Yovovich v. Falls City Lumber Co.*, 585.)

Death—Employers' Liability Act—Death of Servant—Damages of Parent.

2. For the death of a servant, his father, suing under the Employers' Liability Act, was entitled to the amount which he might have expected to come to him as the deceased heir, if the latter should die, to be calculated in view of the average earnings of the deceased, the prospective years he had to live, his industry, frugality and saving qualities, irrespective of the age of the father. (*Yovovich v. Falls City Lumber Co.*, 585.)

Death—Parent's Action for Death—Employers' Liability Act—Instruction.

3. In a father's action under the Employers' Liability Act against the employer of his son, killed in service, a charge that the jury should not take into consideration, in estimating damages, the wounds to the parent's feelings, nor give compensation for the pain and suffering inflicted upon him, but should estimate the financial loss suffered by the death, sufficiently instructed the jury that the damages were limited to compensatory damages. (*Yovovich v. Falls City Lumber Co.*, 585.)

DECLARATIONS.

See Trusts, 3.

DEEDS.**Deeds—Execution—Requisites.**

1. A written instrument, not sealed, witnessed, or acknowledged, is insufficient to convey title. (*Wiley v. Whitney*, 92.)

Deeds—Condition Subsequent—Effect—Statutes.

2. Under Sections 7102, 7103, L. O. L., providing that a deed of real estate shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied, where plaintiff deeded land to a county, the deed reciting "that this conveyance is made and accepted on condition that certain described real estate is to be used for a site for a high school, and for no other purpose, and, if not so used for such purpose, title shall revert to the grantors," the conveyance was of a fee-simple estate, subject to defeasance by the happening of a condition subsequent, and not a conveyance of a base or determinable fee. (*Wagner v. Wallowa County*, 453.)

Deeds—Ejectment—Right of Action—Breach of Condition Subsequent.

3. Where a grantor of an estate in land in fee simple, subject to defeasance on the happening of a condition subsequent, conveyed to a third person before the happening of the condition, the conveyance passed no right of re-entry. (*Wagner v. Wallowa County*, 453.)

Deeds—Condition Subsequent—Waiver of Breach—Deed to Third Party.

4. Where the grantor of land to a county for school purposes, subject to the condition that title should revert to him upon failure to use for such purposes, conveyed, before the happening of such condition, to a third person, such conveyance, although inoperative to give such third person a right of entry for breach of condition, nevertheless operated as a waiver of the condition by the grantor, preventing his ever asserting a right of entry against the grantee county for breach of condition. (*Wagner v. Wallowa County*, 453.)

Deed Absolute in Form, a Mortgage.

See Mortgages, 2, 3.

Evidence Necessary to Establish Trust.

See Trusts, 7.

DEFAULT.

See Appeal and Error, 8.

See Mechanics' Liens, 1.

DEFINITIONS.

See Words and Phrases.

DELUSION.

See Wills, 5.

DEMURRER.

Order Overruling Demurrer to Answer not Appealable.

See Appeal and Error, 9.

Special Demurrer in Nature of Plea in Abatement.

See Justices of the Peace, 1.

DEPARTURE.

See Equity, 3.

DISMISSAL AND NONSUIT.

See Appeal and Error, 10, 11, 16.

DISQUALIFICATION.

See Judges, 1.

DISTRICT AND PROSECUTING ATTORNEYS.

District and Prosecuting Attorneys—Tenure—Declared Vacancy.

1. Under Laws of 1913, page 686, providing that there shall be a district attorney for every county, that each district attorney then in office shall become a district attorney for the county in which he resides, and that, where the term of such district attorney expires prior to 1916, there shall be a vacancy which shall be filled by appointment, a district attorney previously elected holds his office by election and not by legislative appointment, and the provision of the act declaring a vacancy before his successor is elected and qualified is invalid. (State ex rel. v. Hodgins, 480.)

DIVORCE.

Divorce—Support of Children—Enforcement—Foreign Judgment—Finality.

1. Under Section 138, Civil Code of California, providing that the court may, pending an action for divorce, or at the final hearing, or at any time thereafter during the minority of any children, make such orders for their custody and maintenance as may be necessary or proper, and may at any time modify or vacate the same, and Section 139, providing that where a divorce is granted for an offense of the husband the court may compel him to make suitable allowance for the wife's support, and may modify its orders, a decree of the California Superior Court that defendant pay to his divorced wife \$20 per month for the support of their child during its minority and until otherwise ordered, was not a final decree, since it was subject to vacation at any time, so that the Circuit Court in Oregon had no jurisdiction to render a decree enforcing it. (Rowe v. Rowe, 491.)

Divorce—Alimony—Foreign Decree—Enforcement.

2. In a wife's action for divorce brought in California, a finding or conclusion that she was entitled to \$10 per month to be paid by defendant, without any decree following such conclusion, was not a final decree upon which execution might issue, nor one on which suit could be brought in another state. (Rowe v. Rowe, 491.)

DOWER.**Dower—Bar—Joinder in Deed of Husband.**

1. A wife joining her husband in executing a deed barred her inchoate right of dower; and hence no estate, right, title or interest remained to be conveyed by her subsequent deed after her husband's death. (*Robison v. Hicks*, 19.)

Dower—Mortgage as Bar.

2. A husband and wife acquired a donation land claim. The wife died, and the husband married plaintiff. Thereafter the husband, plaintiff joining, mortgaged his undivided half of the claim. *Held*, that, a patent having been issued to the husband for the south half of the claim, the mortgage lien attached only to the undivided half of the south half of the claim, and, notwithstanding foreclosure, plaintiff was, upon the husband's death, vested with a dower estate in an undivided half of the south half of the claim. (*Wiley v. Whitney*, 92.)

DUE PROCESS OF LAW.

See Constitutional Law, 2.

EJECTMENT.

See Deeds, 3.

See Estoppel, 2.

ELECTION.

See Municipal Corporations, 3, 4, 6.

ELECTRICITY.**Electricity—Franchise—Construction—Meters.**

1. Under an ordinance granting a franchise to an electric light company, and providing in one clause that a flat rate should be charged during the life of the franchise, and providing in another clause a maximum rate in case meters were installed, the company has a right to install meters at any time, where it does not charge therefor more than the rate fixed. (*Town of Haines v. Eastern Oregon L. & P. Co.*, 402.)

EMINENT DOMAIN.**Eminent Domain—Proceedings—Verdict—Sufficiency—"General Verdict."**

1. A verdict awarding compensation in condemnation proceedings by a city under Sections 6859, 6860, 6862, 6866, 6871, 6874. L. O. L., regulating the procedure in eminent domain proceedings, and empowering the city to condemn property, is a "general verdict," within Section 152, defining a "general verdict" as that by which the jury pronounces generally on all of the issues in favor of plaintiff or defendant, and is a finding for the city on the issue of necessity for the taking, and inability of the parties to agree on compensation, and sustains a judgment of condemnation. (*Skelton v. Newberg*, 126.)

Eminent Domain—Trial—Verdict—Sufficiency.

2. Where an action to condemn real estate is tried as any other action at law by a jury, the verdict, in the absence of a statute

commanding it, need not describe the property taken. (Skelton v. Newberg, 126.)

Eminent Domain—Compensation—Constitutional and Statutory Provisions.

3. Article I, Section 18, and Article XI, Section 4, of the Constitution, declaring that private property shall not be taken for public use without compensation being first made or secured in such manner as may be prescribed by law, permit the legislature to enact Sections 6871, 6874, L. O. L., authorizing issuance by a city of an order on its treasurer to pay compensation awarded in condemnation proceedings, and an order issued by a city condemning land is sufficient. (Skelton v. Newberg, 126.)

See Equity, 2.

EMPLOYERS' LIABILITY ACT.

See Appeal and Error, 31.

See Death, 1-3.

See Master and Servant, 11, 15-19.

EQUITABLE RELIEF.

See Appeal and Error, 7.

EQUITY.

Equity—Default Judgment—Vacation.

1. Defendant in a suit to quiet title, who had an opportunity to set forth by answer the facts subsequently alleged in her complaint as a foundation upon which to assert a lien upon the premises, and in whose pleading nothing appeared to explain a reasonable cause for a default judgment against her, or to excuse her neglect and failure to answer, could not have it set aside. (Robison v. Hicks, 19.)

Equity—Remedy at Law—Adequacy.

2. Where a judgment in condemnation proceedings has no legal force, the owner whose land was sought to be taken has adequate remedy at law to recover possession of the property wrongfully taken by plaintiff in the condemnation. (Skelton v. Newberg, 126.)

Equity—Pleading—Reply—Departure.

3. In suit to quiet title, where the complaint set up in one paragraph fee-simple ownership, and in another title by adverse possession, while the reply alleged that it had been gained by sale on execution, concluding by saying that, immediately after such sale, the plaintiffs took possession and held continually, the complaint and reply were not so inconsistent as to render erroneous the refusal of the court to strike the reply as a departure, since the complaint's allegation of fee-simple ownership rendered permissible its further amplification in the reply by the allegation of title by the sale. (Mascall v. Murray, 637.)

ESTATES.

See Wills, 1, 2.

ESTOPPEL.**Estoppel—What Constitutes—Right of Entry.**

1. When a grantor of land subject to a defeasance for condition broken conveys any interest to a third person before such breach, he is thereafter estopped to assert a right of entry. (*Wagner v. Wallowa County*, 453.)

Estoppel—Assignment of Right of Re-entry—Persons for Whom Available—Privity.

2. In an action in ejectment by an original grantor, to recover for an alleged breach of condition subsequent, from the original grantee, lands conveyed on fee condition, the fact that such grantor had, subsequent to his deed and prior to any alleged breach, conveyed the lands to another is available as a defense against such grantor; there being such a privity of estate in the land as to give effect to the subsequent deed to a stranger. (*Wagner v. Wallowa County*, 453.)

See Fraudulent Conveyances, 9.

See Principal and Agent, 3.

See Waters and Watercourses, 4.

EVIDENCE.**Evidence—Hearsay.**

1. Hearsay evidence is incompetent. (*Chance v. Graham*, 199.)

Evidence—Opinion Evidence—Competency of Witnesses.

2. A witness with four years' railroad experience, and a witness familiar with the speed of street-cars by observing speedometers while riding on motorcycles and in automobiles running at the side of street-cars, are competent to testify to the speed of a car. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Evidence—Opinion Evidence—Competency of Witnesses.

3. A witness qualified to testify on the subject may testify that a street-car was running faster than the ordinary rate, for the statement implies a basis for comparison. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Evidence—Opinion Evidence—Subjects of Expert Testimony.

4. An experienced motorman may, in response to a hypothetical question describing the type of street-car and the distance covered by it after the application of the emergency brakes, give his opinion as to the speed of the car, because the subject is within the field of expert testimony. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Evidence—Presumptions—Performance of Official Duty.

5. There is a presumption that officers, such as commissioners of the county and school superintendent, are fair men. (*Magill v. French*, 237.)

Evidence—Action by Bank—Letter of Cashier.

6. In a suit by a bank on a note, a letter written by its cashier on its stationery and signed by him in his official capacity was ad-

missible in evidence, on the issue of fraud set up by the defense, as being the letter of the bank. (*Bank of Gresham v. Walch*, 272.)

See Account, 1.

See Appeal and Error, 18, 19, 34.

See Criminal Law, 2.

See Fraudulent Conveyances, 2-5.

See Injunction, 2.

See Larceny, 1.

See Master and Servant, 5.

See Mines and Minerals, 1.

See Payment, 1.

See Release, 1.

See Specific Performance, 2.

See Statute of Fraud, 1.

See Street Railroads, 6.

See Trial, 1, 3.

See Trusts, 3, 4, 6, 7, 8.

See Wills, 8.

See Witnesses, 2, 3, 7.

Note and Mortgage not Intended to Operate as Such.

See Cancellation of Instruments, 1, 2.

Testimony of Accomplice must be Corroborated.

See Criminal Law, 1.

EXCEPTIONS.

See Appeal and Error, 23.

EXCEPTIONS, BILL OF.

Exceptions, Bill of—Nature and Purpose.

1. A "bill of exceptions" is a memorial of matters occurring at the trial of a cause which do not otherwise appear of record. (*Kubik v. Davis*, 501.)

Exceptions, Bill of—Compelling Allowance—Mandamus.

2. While *mandamus* will lie to compel a circuit judge to sign a bill of exceptions, the Supreme Court cannot dictate to the trial judge what the contents of such bill shall be. (*Kubik v. Davis*, 501.)

Exceptions, Bill of—Compelling Allowance—Mandamus.

3. Under Section 556, L. O. L., providing that, upon appeal from a decree, the suit shall be tried anew upon the transcript and accompanying evidence, findings of fact and conclusions of law, filed by the trial judge in a suit in equity, are not binding upon the Supreme Court, and an order for their filing *nunc pro tunc* did not affect the rights of the parties, and, it not being apparent that such order was final, material, or reviewable, *mandamus* would not lie to compel the trial judge to sign a bill of exceptions in connection with an appeal from the *nunc pro tunc* order, especially as it would seem that the chapter of the statutes relating to bills of exceptions does not apply to suits in equity. (*Kubik v. Davis*, 501.)

See Appeal and Error, 4, 36.

EXCHANGE OF PROPERTY.**Exchange of Property—Rescission—Burden of Proof.**

1. Plaintiff, who alleged that defendant made misrepresentations in effecting an exchange of property, has the burden of proof. (*Black v. Irvin*, 561.)

Exchange of Property—Misrepresentations—Right to Rely on.

2. A statement that a restaurant, for which plaintiff was induced to exchange his farm, was a good place and profitable, is not a statement of a positive fact on which plaintiff was entitled to rely. (*Black v. Irvin*, 561.)

Exchange of Property—Fraud—Misrepresentations.

3. In exchange of property, statements which are mere boosting or puffing cannot be the basis of an action for fraud or rescission. (*Black v. Irvin*, 561.)

EXECUTION.**Execution—Notice of Sale—Sufficiency and Effect.**

1. An advertisement of a sheriff's sale on execution reciting judgment in favor of a creditor against certain debtors, the levy upon all their right, title and interest in the real property described by legal subdivisions, divested the debtors of any title to the property; the use of the name, "Hattie Brown" instead of "Kittie Brown" not vitiating a prior sufficient description, and this independently of Section 241, L. O. L., subdivision 4, which expressly makes a confirmation of sale a conclusive determination of the regularity of the proceedings for sale. (*Brown v. Farmers & Merchants' Nat. Bank*, 113.)

Execution—Sale of Realty—Validity.

2. Where there was no official record of a sale of realty on execution, no order was made confirming the sale, and no deed delivered, although a certificate of sale was given to the purchasers, the legal title to the property remained in the judgment debtors, and the sheriff's sale did not convey a fee title, even if such sale was in fact regular in all respects. (*Mascall v. Murray*, 637.)

Execution—Title by Void Sale Equitably Confirmed by Judgment Debtors.

3. Where a sale of realty under execution did not vest title in the purchasers because there was no official record thereof, no order confirming it, and no deed delivered, the land being assessed thereafter to the purchasers, they and those claiming under them paying taxes, which the judgment debtors never did thereafter, and where such debtors waited 18 years, until the purchasers sued to quiet title, before claiming title designedly planning to delay until the statute of limitations barred any indebtedness of theirs before asserting title so as to recover the land free of the claims of creditors, the silence and acquiescence of the judgment debtors was an equitable confirmation of the void sale under execution, operating to validate what was in point of law no sale at all. (*Mascall v. Murray*, 637.)

EXECUTORS AND ADMINISTRATORS.**Executors and Administrators—Necessity of Administration—Lien on Land—Rights of Heirs.**

1. Where plaintiff's father conveyed land to him on the condition that he should pay \$600 to his brother when the latter became 21 years of age, charging the amount as a lien on the land, and authorizing the lien to be foreclosed for failure of payment, the fact that such brother died previous to attaining his majority, without letters of administration being taken out on his estate, did not divest the claims of his heirs to the amount of \$600 secured by the land. (*Pierce v. Parks*, 58.)

EXECUTORY DEVICES.

See Wills, 3.

EXPENSES.

See Receivers, 1-3, 5.

EXPERT TESTIMONY.

See Evidence, 4.

FALSE PRETENSES.**False Pretenses—Defenses—Illegality of Transaction—Sale of Land by Indian—Statutes.**

1. Under Section 1964, L. O. L., denouncing the crime of obtaining money by false pretenses, the defendants, a mixed-blood Indian woman and her husband, were indicted for having represented to the prosecuting witness that the woman was owner of 160 acres of land, which land was an allotment by the United States Department of the Interior to one D., an Indian, from whom the woman claimed as heir, and that she was authorized to lease such land without interference from the superintendent in charge of an Indian reservation or the Department of the Interior. *Held*, that a demurrer to the indictment was properly sustained; the prosecuting witness, in attempting to obtain the lands having violated act of Congress of February 8, 1887, c. 119, 24 Stat. 389 (U. S. Comp. Stats. 1913, § 4201), Section 5, providing that any contract touching land set apart and allotted to an Indian before the expiration of 25 years shall be void, while the statute relative to obtaining money by false pretenses is to protect only innocent persons, not those in any degree *particeps criminis* with the defendant. (*State v. Alexander*, 329.)

FEE.**Estate of Trustee and of Cestui Que Trust.**

See Trusts, 2.

FINDINGS.

See Appeal and Error, 5, 21.

See Highways, 2.

Effect of Findings in Equity Suits.

See Appeal and Error, 3.

FORECLOSURE.

See Mechanics' Liens, 1.

See Mortgages, 1.

FOREIGN JUDGMENT.

See Divorce, 1, 2.

FORFEITURE.

See Mines and Minerals, 2, 3, 4, 5.

FRANCHISES.**Franchises—Construction—Ordinances.**

1. The provisions of a franchise when treated as a contract are not to be construed as the clauses of a municipal charter, but, like any other agreement, such interpretation is to be adopted as will determine the intention of the parties from the language they have employed, and, when two interpretations are permissible, that construction which is most favorable to the public should be adopted. (Town of Haines v. Eastern Oregon, L. & P. Co., 402.)

See Constitutional Law, 1.

See Electricity, 1.

FRAUD.**Fraud—Presumptions.**

1. Fraud cannot be presumed, but must be alleged and established by the greater weight of the evidence. (Black v. Irvin, 561.)

See Exchange of Property, 3.

See Release, 1, 2, 4.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.**Fraudulent Conveyances—Consideration—Burden of Proof.**

1. Where a transfer of property is alleged to have been fraudulent as against creditors of the transferrer, the transferee has the burden of proving payment of consideration to show that he was an innocent purchaser. (Weber v. Richardson, 286.)

Fraudulent Conveyances—Admissibility of Evidence.

2. A judgment creditor of a lessor of a farm levied on personal property on the farm loaned by the lessor to the lessee, and B. brought replevin against the sheriff claiming title to the property levied on under a transfer from the lessor. Defendant in replevin claimed that the transfer was made with the intent to defraud the judgment creditor. The lessee claimed no title to the property. *Held*, that the lease of the farm offered in evidence by plaintiff was immaterial and properly excluded. (Bohart v. Parker, 371.)

Fraudulent Conveyances—Admissibility of Evidence.

3. In such case, a release by the lessee to the lessor of a part of the personal property so loaned was admissible as tending to show an

effort to forestall the judgment creditor in the collection of his judgment. (Bohart v. Parker, 371.)

Fraudulent Conveyances—Evidence—Notes.

4. In such action, where there was no dispute that certain notes were received by the lessor as part of the consideration for the property, such notes were properly excluded as immaterial. (Bohart v. Parker, 371.)

Fraudulent Conveyances—Evidence—List of Property.

5. In such action, the exclusion of a list of all the property plaintiff purchased from the lessor, as being included in the complaint, as having been already testified to, and as immaterial, was proper. (Bohart v. Parker, 371.)

Fraudulent Conveyances—Rights of Creditor—Knowledge of Fraud.

6. The mere fact that a judgment creditor had knowledge of the fraud in a conveyance by the judgment debtor would not prevent him from setting aside a conveyance made with that intent, but is valuable only on the question of acquiescence. (Grant County Bank v. Hayes, 407.)

Fraudulent Conveyances—Preference to Creditor.

7. Under Sections 7397-7041, L. O. L., relating to fraudulent conveyances, a debtor has the right to prefer one creditor over another. (Grant County Bank v. Hayes, 407.)

Fraudulent Conveyances—Consideration—Valuable.

8. Under Section 7401, L. O. L., protecting a purchaser for valuable consideration in case of fraudulent conveyances, if the purchaser has notice of the fraud, it is immaterial what consideration is paid, and if the purchaser has no notice, it is not necessary that the consideration be adequate if it is valuable. (Grant County Bank v. Hayes, 407.)

Fraudulent Conveyances—Rights of Creditor—Knowledge of Transaction—Estoppel.

9. In an action by the assignee of a judgment creditor to set aside as fraudulent a conveyance from the debtor to his wife, evidence held to show that the judgment creditor, who was an uncle of the debtor, acquiesced in the sale, thereby defeating the assignee's right of action. (Grant County Bank v. Hayes, 407.)

GRAND JURY.

See Witnesses, 1.

GUARDIAN AND WARD.

See Insane Persons, 1.

HAINES, CHARTER OF.

Town of Haines v. Eastern Oregon L. & P. Co., 402.

HARMLESS ERROR.

See Appeal and Error, 17-19, 32.

See Criminal Law, 2.

See Trial, 6.

HAZARDOUS OCCUPATION.

Is a Question of Fact for the Jury.

See Master and Servant, 16.

HEARSAY.

See Evidence, 1.

HIGHWAYS.**Highways—Vacation—Statute.**

1. Under Section 6279, L. O. L., providing for the vacation of county highways, and requiring that a petition for the laying out or vacating of such a highway shall specify the place of beginning, the intermediate points, and the place of termination, where the petition described the road to be vacated by name, and as beginning at its connection with another named road on a certain township line, 336 feet north of a certain corner of a subdivision of a given section in a given road district, thereafter giving the general direction of the highway, the sections over which it crossed, to where it connected with a specified public road, and there terminating, 40 rods west of a corner of a sectional subdivision, there was full compliance with the statute in respect to locating the road. (*Heuel v. Wallowa County*, 354.)

Highways—Vacation—Review of Proceedings—Presumptions—Findings.

2. Under Section 605, L. O. L., providing that a writ of review shall be allowed where an inferior tribunal appears to have exercised its judicial functions erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right of the plaintiff, where, on appeal from a decision of the Circuit Court dismissing such writ to re-examine the action of the County Court in vacating a highway, the evidence which was before the County Court, as to the right of remonstrators to be counted as opposed to the vacation, was not incorporated in the record, the Supreme Court could not presume that the County Court erred in excluding them from consideration, as opposed to the vacation, since, the County Court having jurisdiction of the proceedings, the burden was on plaintiff seeking to have the proceedings set aside on writ of review to show that it erred or exceeded its jurisdiction, and also that such error injured some substantial right of the plaintiff, as required by the statute. (*Heuel v. Wallowa County*, 354.)

Highways—Vacation—Notice to Remonstrators—Statutes.

3. Under Section 6288, L. O. L., requiring the County Court to publicly read the report of the viewers, in proceedings to vacate a highway, on two different days of the same term, and then to proceed as indicated, where the petitioners filed a motion contesting the qualifications of certain signers of the remonstrance, it was not a prerequisite to a valid vacation that service of the motion be had upon the remonstrators or their attorneys before hearing, since a proper petition, accompanied by proof that the statutory notices have been posted, fulfills the requirements of law as to service of process in such proceedings, while to invalidate them for want of an additional notice of each step taken would render the road laws practically unenforceable. (*Heuel v. Wallowa County*, 354.)

See Statutes, 2.

HUSBAND AND WIFE.**Husband and Wife—Household Expenses—Liability on Note—Statute.**

1. Under Section 7039, L. O. L., providing that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or of either of them, and that in relation thereto they may be sued jointly or separately, although an action at law may be maintained against a married woman for the value of goods purchased by her husband and used as family necessities, yet the realty of a wife cannot be subjected to the payment of a note given by her husband to evidence his liability to a tradesman for household supplies; her liability under the statute being only upon the original account for goods sold and delivered. (*Dale v. Marvin*, 528.)

See Judgment, 4.

IMPEACHMENT.

See Witnesses, 5-7.

INCAPACITY.

See Wills, 5.

INDICTMENT.**Indictment—Amendments—Defects in Form.**

1. Under Article VII, Section 18, of the Constitution, providing that any district attorney may file an amended indictment, whenever an indictment has been held defective in form, an indictment charging the arson of a barn, which did not describe the owner, cannot be amended so as to supply the defect, for the allegation of ownership is an essential to the offense, and so is not a mere formal allegation, but is matter of substance that must be proved. (*State v. Moyer*, 396.)

INITIATIVE AND REFERENDUM.

See Municipal Corporations, 10.

INJUNCTION.**Injunction—Continuing Trespass.**

1. Where a trespass is continued and made up of successive acts, and the threat and intention of continuing are manifest, equity will enjoin it on the ground that each separate trespass forms a separate cause of action and that it would be idle to require the plaintiff to bring a distinct action for each trespass. (*Central Oregon Irr. Co. v. Whited*, 255.)

Injunction—Grounds—Prevention of Irreparable Loss—Complaint.

2. In an action to restrain the removal of personalty from premises leased to defendants, where the complaint did not allege that the property was attached to the realty, or that the proposed manner of removal would injure either the realty or the personalty, an allegation of irreparable injury, without a recital of any facts indicating a probability thereof, being a mere conclusion of law, and the insolvency of the defendants not being sufficient of itself to show that the removal would cause irreparable injury, the complaint failed to give jurisdiction in equity. (*Stewart v. Erpelding*, 309.)

Injunction—Grounds—Prevention of Irreparable Loss—Sufficiency of Evidence.

3. In an action to restrain the removal of personalty from leased property, evidence *held* insufficient to sustain the complaint alleging the necessity of an injunction to prevent irreparable loss. (*Stewart v. Erpelding*, 309.)

Injunction—Bonds—Necessity.

4. Under Section 417, L. O. L., providing that before allowing an injunction the court shall require of plaintiff an undertaking with sureties, an injunction should not be granted on the court's own motion, unless plaintiff gives the required undertaking. (*Henderson v. Tillamook Hotel Co.*, 379.)

See Appeal and Error, 10.

See Taxation, 1.

INSANE PERSONS.**Insane Persons—Guardianship—Adjudication of Sanity—Effect—Statute.**

1. Section 3, page 680, Laws of 1913, provides that the county judge of any county, upon being notified in writing that any person, by reason of insanity, is unsafe to be at large, or is suffering from exposure or neglect, shall cause such person to be committed to a hospital for the insane upon a determination of his insanity by the county judge and a physician. Section 1319, L. O. L., provides that the several County Courts shall have power to appoint guardians for the estates of insane persons, idiots and all who are incapable of conducting their own affairs. Section 1342 defines an "insane person" as including every idiot, person not of sound mind, lunatic, and distracted person. Petitioner was committed to a hospital for the insane under Section 3, page 680, Laws of 1913. Guardians were appointed for his estate, and after his discharge from such hospital as improved he was recommitted thereto. From the recommittal order of the County Court he appealed to the Circuit Court, where an inquest before a jury resulted in his discharge as sane, and thereupon he petitioned for the removal of his guardians. *Held* that, since Section 1342, L. O. L., distinguishes between lunatics and persons of unsound mind, the mere fact that an incompetent has been released from an asylum to which he was committed as a lunatic, or unsafe to be at large, is no reason why he should be relieved of guardianship as a person of unsound mind incapable of conducting his own affairs, except upon express averment and adequate proof that he is able to conduct his own affairs, the absence of which from the petition and evidence in the instant case was fatal to the award of relief sought. (*In re Sneddon*, 470.)

INSTRUCTIONS TO JURIES.

See Appeal and Error, 32.

See Assault and Battery, 1.

See Corporations, 5.

See Criminal Law, 1, 4.

See Death, 3.

See Master and Servant, 3.

See Municipal Corporations, 9.
See Street Railroads, 5.
See Trial, 2, 3, 5, 7, 8, 9.

Modification of Requested Instruction.

See Trial, 9.

INSURANCE.

Insurance—Fraternal Benefit Insurance—By-laws—Validity.

1. A by-law of a fraternal benefit insurance society, providing that the local officers shall be considered as agents of the members in accepting and transmitting payments for insurance, is valid. (Hartman v. National Council, 153.)

Insurance—Fraternal Benefit Insurance—By-laws—Validity.

2. A by-law of a fraternal benefit society, providing that a member, suspended for nonpayment of dues, shall be reinstated only when in good health, and that the payment of arrearages shall be considered a warranty of good health, is valid, and a member should be held to a strict compliance therewith. (Hartman v. National Council, 153.)

Insurance—Fraternal Benefit Insurance—By-laws—Waiver.

3. Where the by-laws of a fraternal benefit society provided that a suspended member could not be reinstated, except while in good health, and that the local officers had no authority to waive the provisions of the by-laws, the acceptance by the local officers of a payment of arrearages of a suspended member, with knowledge that the member was at that time sick, does not waive the provisions of the by-laws and reinstate the member. (Hartman v. National Council, 153.)

Insurance—Fire Insurance—Subrogation of Insurer.

4. Where a mortgagee insures the hypothecated property at his own expense, the insurer, paying a loss by fire to such mortgagee to the amount of the debt, is subrogated to the mortgagee's right in such debt, since the insurance contracted and paid for by the mortgagee in effect makes the insurance company a surety to the holder of the mortgage for the payment of the debt. (Milwaukee Mechanics' Ins. Co. v. Ramsey, 570.)

Insurance—Fire Insurance—Subrogation of Insurer.

5. Where insured property is burned by the tortious act of one not a party to the contract, the insurer paying the loss, is subrogated *pro tanto* to the chose in action the payee has against the tortfeasor by reason of his insurable interest. (Milwaukee Mechanics' Ins. Co. v. Ramsey, 570.)

Insurance—Fire Insurance—Subrogation of Insurer.

6. Realty was insured against fire, the loss being payable to a mortgagee as its interest might appear; otherwise to the insured. Within the term of the policy the property was destroyed by fire, and upon the mortgagee and owner suing the insurance company the mortgagee recovered judgment for the amount of its secured debt, while the owner failed to recover because he had contracted to sell, violating a policy restriction. The insurance company paid the

mortgagee's judgment, and demanded that the mortgagee assign to it the owner's note and mortgage, which was refused. Thereupon the company sued the mortgagee and the owner, claiming subrogation to the rights of the mortgagee against the owner, and seeking to foreclose the security and recover the amount of the debt. *Held*, that the insurance company could not recover, since by the policy it agreed with the owner to pay a certain designated person, the mortgagee, in case of a loss, but did not agree to pay the owner's debt to the mortgagee as such. (*Milwaukee Mechanics' Ins. Co. v. Ramsey*, 570.)

INTENT.

Construction of Legislative Act.

See Statutes, 5.

INTOXICATING LIQUORS.

Intoxicating Liquors—Offenses—Statutes—Constitution.

1. The home rule amendment of 1906 to Section 2, Article XI, of the Constitution, whereby municipalities were authorized to prepare their own charters subject to the Constitution and criminal laws of the state, did not abrogate Section 2142, L. O. L., providing that one who sells liquor to a minor shall, upon conviction, forfeit his license, so as to permit a city to authorize a violation of that law. (*State v. Boysen*, 48.)

IRRIGATION.

IRRIGATION DISTRICTS.

IRRIGATION IMPROVEMENT COMPANIES.

See Waters and Watercourses, 1-6.

JUDGES.

Judges—Disqualification—Interest.

1. Where, two days before commencement of the suit, the trial judge sold his stock in the defendant corporation to plaintiff, he was not technically disqualified by interest, within Section 956, L. O. L.; but it would be preferable for him not to hear the case. (*Henderson v. Tillamook Hotel Co.*, 379.)

JUDGMENT.

Judgment—Entry—Time of Entry—Statutory Provisions.

1. Section 201, L. O. L., providing that the judgment shall be entered by the clerk within the day on which the verdict is returned, is directory only, and a judgment in condemnation proceedings entered 24 days after verdict is valid, within Section 6860, providing that an action to condemn land shall be commenced and proceeded to final determination as an action at law, except as otherwise specially provided. (*Skelton v. Newberg*, 126.)

Judgment—Satisfaction—Notice of Assignment.

2. Where a judgment debtor, at the time he procured satisfaction of the judgment to be noted on the margin of the proper record by the judgment creditor's attorney in consideration of payment by him, had no notice that the judgment creditor had assigned the judg-

ment, the court properly refused to vacate the cancellation of the judgment at the instance of the assignee. (*Windsor v. Mourer*, 281.)

Judgment—Liens—Justices.

3. Section 771, L. O. L., provides that, when a copy of a writing is certified to be used in evidence, the certificate shall state that the copy was compared with the original. The certificate by a justice to a copy of a judgment which was filed in the office of the county clerk in accordance with Section 2442, L. O. L., merely recited that it was a full, true and correct copy of the justice's docket. *Held*, that the certificate was insufficient, and the filing created no lien. (*Evans v. Marvin*, 540.)

Judgment—Conclusiveness—Persons Bound—Husband and Wife.

4. A wife is not bound by judgment in an action against her husband to which she was not a party. (*Dale v. Marvin*, 528.)

See Justices of the Peace, 2, 3.

Appeal from Void, but not Voidable, Decree by Default.

See Appeal and Error, 8.

JURISDICTION.

See Appeal and Error, 11, 28.

See Corporations, 1, 4.

See Justices of the Peace, 1, 3.

JUSTICES OF THE PEACE.

Justices of the Peace—Jurisdiction—Capacity of Party to Sue—Assumed Name—Special Demurrer.

1. A justice court is not deprived of jurisdiction of a suit by a person doing business under an assumed name because the certificate required by Laws of 1913, page 272, Section 5, is not filed with the county clerk, unless the defect is raised by a special demurrer in the nature of a plea in abatement, since the act affects the qualification of the party to sue and not the statement of the cause of action. (*Beamish v. Noon*, 415.)

Justices of the Peace—Judgment—Pleading.

2. Under Section 87, L. O. L., declaring, in pleading a judgment or other determination of a court of special jurisdiction, it shall not be necessary to allege the facts conferring jurisdiction, but such judgment may be stated to have been duly made, and, if such allegation be controverted, the party pleading shall be bound to establish the facts conferring the jurisdiction, a party relying on the judgment of a Justice's Court must prove the facts conferring jurisdiction. (*Evans v. Marvin*, 540.)

Justices of the Peace—Judgment—Jurisdiction.

3. Section 951, L. O. L., declares that a Justice's Court has jurisdiction of actions to recover money or damages when the amount claimed does not exceed \$250, and for the recovery of statutory penalties and personality of a value not exceeding that sum. Section 952 provides that justices shall not have jurisdiction of actions involving title to real property, or of actions for false imprisonment, libel, slander, malicious prosecution, etc. The exemplification of a journal

of a justice, showing the entry of a default judgment, did not disclose the nature of the action upon which judgment was rendered. *Held*, that a party relying on the validity of such judgment could not maintain a lien by reason thereof; it not appearing that the justice had jurisdiction. (*Evans v. Marvin*, 540.)

See Judgment, 3.

KNOWLEDGE.

See Fraudulent Conveyances, 6, 9.

LA GRANDE, CHARTER OF.

Murray v. La Grande, 598.

LARCENY.

Larceny—Evidence.

1. In a prosecution for larceny of cattle, where there was no proof of the organization or existence of a certain cattlemen's association, except statements by certain witnesses, the refusal of the court to allow defendant to ask a witness, who had testified that he was a member of such cattlemen's association, whether the organization did not make a standing offer of \$1,000 to anyone furnishing evidence to convict another of cattle stealing, was proper, there being no attempt to show any such offer in relation to the pending case. (*State v. Gulliford*, 231.)

LAWS OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

LIENS.

See Executors and Administrators, 1.

See Judgment, 3.

See Mechanics' Liens, 2.

See Vendor and Purchaser, 1.

LIMITATION OF ACTIONS.

Limitation of Actions—Maturity of Obligation.

1. Where a father conveyed land to his son, charging it with a lien to secure the payment by the grantee of \$600 to his brother, when the beneficiary should reach his majority, and such beneficiary died before he attained such age, his previous death could not hasten the maturity of the debt to initiate the period of the statute of limitations. (*Pierce v. Parks*, 58.)

LOGS AND LOGGING.

Logs and Logging—Contracts—Payments—Readjustment—"Sawmill Tally."

1. Under a contract of sale by W. to C. of standing timber, to be removed by C., providing for payments monthly, for the amount removed, as shown by the log scale, and for adjustment and final determination semi-annually, from the "sawmill tally" (that is, the tally kept at the mill), of the amount removed, C., in whose hands

were the cutting, manufacturing and marketing of the logs, having negligently failed to keep or preserve a sawmill tally, cannot have an adjustment, as the court can adopt no other method of measurement than that provided for by the contract, as this would be to make a new and different contract. (*Cody Lumber Co. v. Coach*, 106.)

MANDAMUS.

See Exceptions, Bill of, 2, 3.

MASTER AND SERVANT.

Master and Servant—Injuries to Servant—Assumption of Risk.

1. Under the employers' liability law (Laws 1911, p. 16), making it a crime for an employer to originate or continue a hazard that might be prevented, an employee continuing in a hazardous service does not assume the risk of injury; for that would avoid the force of the statute and allow private persons to contract with respect to the commission of crimes. (*Sonnixsen v. Hood River Gas & Elec. Co.*, 25.)

Master and Servant—Injuries to Servant—Actions—Jury Question.

2. Evidence on the questions whether an injured lineman knew of defects or was guilty of negligence in failing to properly insulate electric wires *held*, under the evidence, for the jury. (*Sonnixsen v. Hood River Gas & Elec. Co.*, 25.)

Master and Servant—Injuries to Servant—Contributory Negligence—Instructions.

3. In a personal injury action by an employee, the court charged that his contributory negligence would not be a defense, but might be taken into account in affixing the amount of the damages; such negligence being considered in mitigation. The court further charged that the employers' liability law made it incumbent on the jury to compare the negligence of both employer and employee, and that, if the employee was negligent, such negligence might be taken into account in mitigation or reduction of damages. *Held*, that the instructions, read together, correctly stated the law that the contributory negligence of the employee, if any, must be compared with that of the employer, and considered in mitigation in assessing damages. (*Sonnixsen v. Hood River Gas & Elec. Co.*, 25.)

Master and Servant—"Railroad" Employees.

4. The word "railroad" in Section 6946, L. O. L., making every corporation operating a railroad liable for injuries sustained by employees by the default of coemployees, includes a logging railroad used exclusively by the owner. (*Morgan v. Grande Ronde Lumber Co.*, 440.)

Master and Servant—Injury to Servant—Evidence.

5. Where a section-hand on a logging railroad was ordered to assist in loading a train, and when the loading was completed, the foreman directed the men to get aboard, the section-hand while on the train, was entitled to protection as such. (*Morgan v. Grande Ronde Lumber Co.*, 440.)

Master and Servant—Injury to Servant—Contributory Negligence.

6. Whether a section-hand on a logging railroad was guilty of negligence in riding on a logging train, by orders of the foreman, *held*, for the jury. (Morgan v. Grande Ronde Lumber Co., 440.)

Master and Servant—Injury to Servant—Contributory Negligence.

7. Whether a section-hand was negligent in riding with his feet hanging over the edge of a flat car in a logging train, in violation of orders *held*, for the jury. (Morgan v. Grande Ronde Lumber Co., 440.)

Master and Servant—Injury to Employee—Contributory Negligence.

8. Whether an employee on a logging train, running away on a down grade, was guilty of contributory negligence in jumping from the train, *held*, under the evidence, for the jury. (Morgan v. Grande Ronde Lumber Co., 440.)

Master and Servant—Injury to Servant—Care of Employer.

9. An employer, maintaining a logging railroad and carrying employees to load logging trains, must use reasonable precautions to protect them from injury. (Morgan v. Grande Ronde Lumber Co., 440.)

Master and Servant—Injury to Servant—Care Required of Employer.

10. Whether an employer maintaining a logging railroad and operating thereon logging trains was guilty of negligence in failing to maintain the track in a reasonably safe condition and to furnish a locomotive properly equipped, *held*, for the jury. (Morgan v. Grande Ronde Lumber Co., 440.)

Master and Servant—Action for Injury—Employers' Liability Act.

11. Under the Employers' Liability Act (Laws 1911, p. 16), providing that all persons engaged in the construction of any building or other structure shall use all practicable care for the safety of life and limb, without regard to the cost of safety appliances, a servant's action for injury from the falling of a heavy valve while it was being raised by an improvised derrick came within the general clause of the act, and the employer's negligence in failing to fasten the ends of a pole so as to provide a safe place for plaintiff to work would be a violation of the act. (Neilsen v. Portland Gas & Coke Co., 505.)

Master and Servant—Liability for Injuries—Relation Between Parties.

12. Under a contract with a city to grade a street, which provided that the work should be performed under the personal supervision of the contractor, that no part of the contract should be sublet, assigned or transferred without the written consent of the city, and that no such written consent should release the contractor from any obligation either to the city, or to persons employed by any subcontractor, where the contractors sublet a part of the work without the city's consent, they were liable for injuries to a subcontractor's employee as if he had been in their employ, as the city in the control of its streets and the improvement thereof was exercising a governmental function, and its contracts operated at least upon the parties concerned with the force of a law. (Wolsiffer v. Bechill, 516.)

Master and Servant—Actions for Injuries—Questions for Jury.

13. In an action for injuries to an employee of parties engaged in grading a street, caused by falling into a pit which was being filled and alleged to have been due to the failure to provide a safety rail, or similar contrivance to prevent such accidents, the court erred in charging that the case came under the Employers' Liability Act (Laws 1911, p. 16), and that it was for the jury to determine whether such a device as was alleged in the complaint could have been furnished without impairing or destroying the efficiency of the work, as no part of the liability act could apply except the general provision of Section 1 that all owners, contractors or subcontractors, and other persons having charge of, or responsible for, any work involving risk or danger to employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus, and it was for the jury to determine whether the work involved a risk or danger to employees or the public, and whether it was practicable to use a safety rail, or other contrivance. (*Wolsiffer v. Bechill*, 516.)

Master and Servant—Liability for Injuries—Safety Appliances.

14. That a contract with a city did not require the contractor to provide a safety rail or other contrivance to prevent employees from falling into a pit did not relieve the contractor of liability if such contrivance was required by the Employers' Liability Act. (*Wolsiffer v. Bechill*, 516.)

Master and Servant—Employers' Liability Act—Scope.

15. The Employers' Liability Act (Laws 1911, p. 16), Section 1, providing generally that all owners, contractors, subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution for the protection and safety of life and limb, includes hazardous occupations in general, not specifically enumerated in the first part of the section. (*Yovovich v. Falls City Lumber Co.*, 585.)

Master and Servant—Employers' Liability Act—Hazardous Occupation—Question for Jury.

16. Whether the work conducted by an employer, in which an employee is killed or injured, involved a risk or danger to such employee, is a question of fact for the jury. (*Yovovich v. Falls City Lumber Co.*, 585.)

Master and Servant—Employment Within Employers' Liability Act—Lumbering—Question for Jury.

17. Whether deceased, killed by the springing up of a tree trunk which he had just cut through by direction of his foreman, was engaged in a hazardous employment, involving a risk and danger to the employee, within the Employers' Liability Act held for the jury, under the evidence. (*Yovovich v. Falls City Lumber Co.*, 585.)

Master and Servant—Employers' Liability Act—Negligence of Fellow-servant.

18. By direct provision of Employers' Liability Act, Section 5, where the deceased servant, in cutting through a tree, merely con-

formed to the directions of his superior, as was his duty, for the resulting injury the employer was liable, irrespective of any negligence on the part of such superior servant. (*Yovovich v. Falls City Lumber Co.*, 585.)

Master and Servant—Employers' Liability Act—Agent of Employer.

19. By direct provisions of Employers' Liability Act, section 2, the foreman in charge of the lumbering operations, in which deceased servant was engaged at his death, was the agent of the lumber company. (*Yovovich v. Falls City Lumber Co.*, 585.)

See Carriers, 2.

Recovery for Death Under Employers' Liability Act.

See Death, 1-3.

MECHANICS' LIENS.

Mechanics' Liens—Action to Foreclose—Default Judgment—Pleading to Support.

1. In a suit to foreclose a mechanic's lien, a default decree, foreclosing a trust company of all interest in the property, was void, where the allegation only stated it claimed some interest in the property, but failed to define it. (*Oregon Lumber & Fuel Co. v. Hall*, 138.)

Mechanics' Liens—Claim—Statement of Nature of Material.

2. A notice of lien, not stating the nature of the materials furnished, was sufficient. (*Oregon Lumber & Fuel Co. v. Hall*, 138.)

MILWAUKIE, CHARTER OF.

Birkemeier v. Milwaukie, 143.

MINES AND MINERALS.

Mines and Minerals—Public Mineral Lands—Quieting Title—Evidence—Assessment Work.

1. In an action to quiet title to a placer mining claim, evidence held to show that the work of clearing brush and trees therefrom, done by plaintiffs the year prior to defendant's relocation, was for the purpose of enabling the claim to be worked by dredging, and was therefore assessment work, which prevented a forfeiture of the claim. (*Richen v. Davis*, 311.)

Mines and Minerals—Public Mineral Lands—Quieting Title—Burden of Proof—Forfeiture.

2. In a suit to quiet title to a placer mining claim against a junior locator, the burden is on the junior locator to show failure by the senior locator to do the annual work required by Revised Statutes of the United States, Section 2324. (Comp. Stats. 1913, § 4620.) (*Richen v. Davis*, 311.)

Mines and Minerals—Public Mineral Lands—Forfeiture—Resumption of Work.

3. Where the senior locators of a placer mining claim had resumed work thereon prior to the relocation of the claim, the land was not subject to relocation. (*Richen v. Davis*, 311.)

Mines and Minerals—Public Mineral Lands—Forfeiture—Degree of Proof.

4. To establish forfeiture of a mining claim, it must be shown by clear and convincing proof that the former locator has failed to perform the work or make the improvements required, since forfeitures are not favored. (*Richen v. Davis*, 311.)

Mines and Minerals—Public Mineral Lands—Forfeiture—Resumption of Work—Intervening Claim.

5. Where the senior locator of a placer mining claim had failed to do the required assessment work, a relocation by another, who also failed to do the work for a succeeding year, does not terminate the right of the senior locator to resume work thereon, so as to authorize a third person to relocate the claim after the senior locator had done the assessment work for a succeeding year, since it is only against intervening rights that a resumption of work on a mining claim does not resuscitate the possessory rights of the claimant. (*Richen v. Davis*, 311.)

Mines and Minerals—Public Mineral Lands—Assessment Work—Character of Work.

6. The fact that the claimant of a placer claim fenced it and pastured a cow thereon and cut firewood therefrom, while such work cannot be counted as part of assessment work, does not defeat the possessory rights of the claimant, where sufficient mining work was done thereon. (*Richen v. Davis*, 311.)

MISREPRESENTATIONS.

See Exchange of Property, 2, 3.

MISTAKE.

See Release, 3.

MODIFICATION.**Of Requested Instructions.**

See Trial, 9.

MORTGAGES.**Mortgages—Foreclosure—Strict Foreclosure.**

1. Where an attorney agreed to advance money to buy in the state's claim against plaintiff's land, and plaintiff agreed that, if she did not reimburse him within a stipulated time, he should become entitled to that portion of the land, there was a confidential relation between the parties, and plaintiff's rights to the land could be barred only by a strict foreclosure. (*Wiley v. Whitney*, 92.)

Mortgages—Deed Absolute in Form.

2. A conveyance absolute on its face, but in fact intended to be security for the payment of a debt, did not convey title, but was only a mortgage which it was necessary to foreclose as provided by statute, before the grantor or mortgagor could be divested of his estate. The fact that it was agreed that the grantee should have the power to convey the premises and account for the proceeds did not change the character of the transaction. (*Vincent v. First Nat. Bank*, 579.)

Mortgages—Action for Accounting—Proof.

3. A complaint alleging that plaintiffs, being indebted to defendant, executed a warranty deed intended to secure the debt, that it was agreed that the grantee might convey the premises and account for the proceeds, and that the grantee negligently sold or exchanged the premises for other property to plaintiff's damage in a certain sum, showed that the transaction was a mortgage, and that the mortgagee, having no title had attempted to alienate the estate of the mortgagor, and that the title of the mortgagor was in no way disturbed, and hence stated no cause of action. (*Vincent v. First Nat. Bank*, 579.)

MOTIONS.

See Appeal and Error, 16.

MUNICIPAL CORPORATIONS.**Municipal Corporations—Mayor—Vacancies in Office.**

1. Pendleton City charter (Laws 1899, p. 711) provided that the council shall select one of its members to preside over the body and perform the duties of the mayor, in case of his absence or inability to act. Other portions of the charter provide for the filling of any vacancies in office by appointment of the mayor with consent of the council. *Held*, that, as other vacancies were so carefully provided for, the chairman of the council, in case of the death of the mayor, succeeds to the office until it can be regularly filled by election. (*State ex rel. v. Kirkpatrick*, 8.)

Municipal Corporations—Notices—Posting.

2. Where notices of election to create a corporation came from the proper source and were displayed in public places for the designated time, it was immaterial who posted them. (*State on Inf. v. Johnson*, 85.)

Municipal Corporations—Creation—Elections—Posting of Notices—Place of Posting.

3. The posting of a notice of election to create a corporation outside of the proposed municipality, but within the precinct, is sufficient. (*State on Inf. v. Johnson*, 85.)

Municipal Corporations—Creation—Elections—Hours of Election—Notice.

4. Failure of a notice of election to create a corporation, to specify that the polls would be open until 8 o'clock, as required by law, did not affect the validity of the election, in the absence of any crowding at the polls or any proof that anyone came too late to vote. (*State on Inf. v. Johnson*, 85.)

Municipal Corporations—Organization—Conflict With Existing Corporations.

5. The existence of the Port of Coquille River with control of the river and bay and harbors between its boundaries and the sea, but excluding from its territory about 25 miles of the river and bay, does not prevent the creation of a port to include all the territory along the river below the Port of Coquille River, for a

conflict between the two is not probable or possible. (State on Inf. v. Johnson, 85.)

Municipal Corporations—Organization—Elections—Time of Election.

6. The statute providing that the County Court shall call a special election to be held not less than 40 days, nor more than 60 days, on the question of the creation of a municipal corporation, refers to the length of time a call must be made preceding the day fixed for the election. (State on Inf. v. Johnson, 85.)

Municipal Corporations—Creation.

7. The improper inclusion of land within a proposed port will not invalidate the proceedings for incorporation, where the quantity is so negligible that its inclusion could have had no appreciable effect on the election, and it does not infringe on the taxable property in any other port. (State on Inf. v. Johnson, 85.)

Municipal Corporations—Creation.

8. The existence of a port, created to prevent improvements on the river below the corporate limits, does not prevent the organization of a port to include lands is excluded from such limits. (State on Inf. v. Johnson, 85.)

Municipal Corporations—Use of Streets—Actions for Injuries—Instructions.

9. In an action for injuries to a pedestrian on a city street, who was struck by a wagon, a requested instruction that there was no rule of law which makes it negligence for a person to stand in the street for a moment when he has taken proper precautions to look for approaching vehicles was misleading, as implying that the plaintiff would not, as a matter of law, be negligent under such circumstances, whereas it was for the jury to say whether or not such acts were negligent. (Delovage v. Old Oregon Creamery Co., 430.)

Municipal Corporations—Initiative and Referendum Powers—Constitutional Provisions.

10. Section 1a, Article IV, Constitution, reserving to the voters of every municipality the initiative and referendum powers as to all municipal legislation, and Article XI, Section 2, granting to the voters of every city power to enact a municipal charter subject to the Constitution and criminal laws, the common council of the city may not initiate an ordinance and submit it to a vote of the people as an initiative measure without first passing it. (Thielke v. Albee, 449.)

Municipal Corporations—Local Betterment Assessments—Compliance With Charter.

11. The imposition of a tax upon property by a municipality for a local improvement is a hostile proceeding, and before realty can be charged therewith the municipality must have complied with the provisions of its charter as to jurisdiction. (Murray v. La Grande, 598.)

Municipal Corporations—Local Betterment Assessments—Alternative Procedure.

12. The legislative power may provide one or more methods, concurrent or successive in operation, for the imposition of local benefit

assessments to cover the cost of improvements in the future or already made either of which methods the city may pursue. (*Murray v. La Grande*, 598.)

Municipal Corporations—Local Betterment Assessments—Second Assessment—Legislative Power.

13. Although a local benefit assessment under existing laws may have been invalid for want of jurisdiction, the legislature, by subsequent enactment, may provide a new and independent procedure, ignoring even the question of jurisdiction under the former invalid assessment, to levy a tax, or provide for the same, to cover the cost of an actual improvement. (*Murray v. La Grande*, 598.)

Municipal Corporations—Local Betterment Assessment—Failure to Give Jurisdictional Notice—Reassessment—Validity.

14. Where the charter of defendant city provided that, if any local betterment assessment was set aside by any court, the council might cause a new one to be made in like manner for the collection of the amount assessed, and where a street improvement assessment was invalid, because the notice thereof to property owners, made a jurisdictional prerequisite by the charter, was defective, no subsequent reassessment of the cost of the improvement under the provision of the charter was valid, since the giving of notice in the terms described by the charter, the organic law under which the municipality operated, was a condition precedent to the city's securing jurisdiction to make an improvement, and to cure the invalidity in the proceedings it was necessary that they be had *de novo*, with valid notice, etc., to give jurisdiction. (*Murray v. La Grande*, 598.)

MUTUAL BENEFIT INSURANCE.

See Insurance, 1-3.

MUTUALITY.

See Specific Performance, 1.

NAMES.

Names—Assumed Names—Statutes—Right to Sue.

1. Under Laws of 1913, page 270, depriving a person doing business under an assumed name failing to file the certificate required of the right to sue, which act gave 30 days after it took effect for merchants to comply with the act, goods sold at any time up to the end of the 30-day period could be recovered for, though no certificate was filed. (*Beamish v. Noon*, 415.)

NEGLIGENCE.

Negligence—Injuries to Servant—Actions—Contributory Negligence.

1. Under Employers' Liability Act (Laws 1911, p. 18), Section 6, providing that the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damages, the jury, as a basis for computation, should first discover what sum of money would afford indemnity for the injury, irrespective of the cause of the hurt, and then, if both employer and employee are guilty of negligence, they must compare the employer's negligence with that of the employee, and from such

relative estimate assess the damages. (*Sonnicksen v. Hood River Gas & Elec. Co.*, 25.)

Negligence—Swimming-pool—Injuries to Diver—Liability of Proprietor.

2. Although the proprietor of a swimming-pool is not an insurer of the safety of patrons, he is required to use reasonable care in furnishing reasonably safe conditions, and, if they are not reasonably safe, because of depth of water too slight to permit diving with safety, on failure to give notice of such condition and to warn patrons, the proprietor is liable for any resulting injury. (*Johnson v. Hot Springs Land & Imp. Co.*, 333.)

Negligence—Swimming-pool—Injuries to Diver—Contributory Negligence.

3. In an action by the administrator of one killed by diving and striking the bottom of a swimming-pool on account of the insufficient depth of water, where the deceased was a good diver, had been in the plunge previously when the water was at its usual and safe depth, where he was told upon inquiry that the water was only half the usual depth, and was shallow, but was coming in fast, where he waited for the tank to fill up, where he saw his friends standing in the pool, and so was able to judge the depth of the water for himself, and where it was apparent that he realized the danger of diving, he was guilty of contributory negligence. (*Johnson v. Hot Springs Land & Imp. Co.*, 333.)

Negligence—Actions—Questions for Jury.

4. Negligence is a question of fact to be determined by the jury. (*Delovage v. Old Oregon Creamery Co.*, 430.)

See Trial, 7.

Negligence of Fellow-servant.

See Master and Servant, 18.

NEW TRIAL.

New Trial—Grounds—Waiver of Law.

1. Under Section 548, L. O. L., providing that for the purpose of being reviewed an order setting aside a judgment and granting a new trial shall be deemed a judgment or decree, the Circuit Court can enter such order only when in the trial of the cause an error was committed so prejudicial that the judgment rendered would be reversed on appeal. (*Delovage v. Old Oregon Creamery Co.*, 430.)

NOTICE.

See Corporations, 6, 7.

See Execution, 1.

See Highways, 3.

See Judgment, 2.

See Mechanics' Liens, 2.

See Municipal Corporations, 2, 3, 4.

See Principal and Agent, 2.

See Quo Warranto, 1.

See Schools and School Districts, 4.

See Trusts, 8.
See Vendor and Purchaser, 3.
See Waters and Watercourses, 6.

Street Assessment Invalid for Failure of Proper Notice.

See Municipal Corporations, 11-14.

OFFICERS.

Officers—Tenure—Declared Vacancy.

1. Under Section 1, Article XV, of the Constitution, providing that all officers except members of the legislative assembly shall hold their offices until their successors are elected and qualified, the legislature has no power to declare a vacancy in an office held by virtue of an election. (State ex rel. v. Hodgin, 480.)

See Corporations, 5, 6.
See District and Prosecuting Attorneys, 1.
See Municipal Corporations, 1.

OPINION EVIDENCE.

See Evidence, 2-4.

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OREGON CASES.

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OREGON CONSTITUTION.

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OREGON STATUTES.

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See Tables (Code and Session Laws) in Front of this Volume.

PARTIES.

Parties—Capacity to Sue—Assumed Names—Waiver.

1. Where a plaintiff sues under an assumed name without alleging the filing of the certificate as required by Laws of 1913, page 272, Section 5, the incompetency of plaintiff to sue is manifest on the face of the complaint, and is waived by answering to the merits (Section 72, L. O. L.). (Beamish v. Noon, 415.)

PASSENGER.

See Carriers, 1-3.
See Street Railroads, 1-4, 6.

PAYMENT.**Payment—Sufficiency of Evidence.**

1. In an action to reform a deed and to determine whether plaintiff, to whom his father had granted land charged with the payment of \$600 to his brother when the latter should reach his majority, was liable to the brother's heirs for the amount, evidence held insufficient to show payment of such amount to the father as such heir. (*Pierce v. Parks*, 58.)

See Logs and Logging, 1.

See Receivers, 5.

PENDLETON, CHARTER OF.

Bowlesby v. Fitzgerald, 14.

State ex rel. v. Kirkpatrick, 8.

PERSONAL INJURIES.

See Carriers, 1, 3.

See Master and Servant, 1-14.

See Municipal Corporations, 9.

See Negligence, 1-3.

See Street Railroads, 1-6.

PLEADING.**Pleading—Defenses—"Inconsistent Defenses."**

1. Defenses are not inconsistent when they may all be true, and are only inconsistent when some of them must necessarily be false if others are true, and in such a case they cannot be united. (*Susznik v. Alger Logging Co.*, 189.)

Pleading—Defenses—Inconsistent Defenses.

2. In an action for injuries based on the theory of the relation of passenger and carrier between plaintiff and defendant, an answer setting up the Workmen's Compensation Act as affording the remedies for plaintiff, and alleging that plaintiff was guilty of negligence, does not set forth inconsistent defenses, though allegations in the first defense that plaintiff was riding on the train without the consent or knowledge of defendant, and of plaintiff's negligence, are irrelevant, because under the compensation act such questions are eliminated. (*Susznik v. Alger Logging Co.*, 189.)

See Adverse Possession, 3, 4.

See Appeal and Error, 13, 17.

See Equity, 3.

See Injunction, 2.

See Justice of the Peace, 2.

See Mechanics' Liens, 1.

See Quieting Title, 6, 7.

See Vendor and Purchaser, 1.

PORTLAND, CHARTER OF.

Thielke v. Albee, 449.

Quieting Title—Pleading—Legal and Equitable Title—Variance.

7. In an action to quiet title, where opportunity to plead an equitable title by estoppel is presented, but only a legal title is alleged, while equitable title is proved, such proof is a fatal variance. (*Mascall v. Murray*, 637.)

See Mines and Minerals, 1, 2.

QUO WARRANTO.**Quo Warranto—Original Proceedings—Notice.**

1. The requirement of Supreme Court Rule 33 that preliminary notice of an original proceeding in *quo warranto* shall be served on the adverse party is waived by respondent's answer to the merits. (*State ex rel. v. Hodgin*, 480.)

Quo Warranto—Costs—Allowance.

2. Section 2, Article VII, of the Constitution, declaring that the Supreme Court may in its discretion take original jurisdiction in *mandamus* and *quo warranto*, etc., makes Section 562, L. O. L., providing for the allowance of costs to a successful plaintiff, applicable to an original proceeding in *quo warranto*. (*State ex rel. v. Hodgin*, 480.)

Quo Warranto—Costs—Objections—Waiver.

3. Under Section 569, L. O. L., declaring that the losing party must in five days urge his objections to allowance of costs, a defendant in *quo warranto* brought in the Supreme Court must urge his objections to the allowance of costs within that time or they are lost. (*State ex rel. v. Hodgin*, 480.)

Quo Warranto—Costs—Allowance—Enforcement.

4. Section 213, L. O. L., declares that a party in whose favor judgment is given which requires the payment of money may have a writ of execution issued for its enforcement. Section 215 declares that the writ shall be issued by the clerk and directed to the sheriff, while Section 216 declares that it may be issued to the sheriff of any county. Section 983 declares that, when jurisdiction is by organic law conferred on any court or judicial officer, all means to carry it into effect are also given. *Held* that, where the Supreme Court had original jurisdiction of a *quo warranto* proceeding, the Code provisions authorizing the issuance of execution warranted the issuance of execution to recover costs. (*State ex rel. v. Hodgin*, 480.)

RATIFICATION.

See Principal and Agent, 3.

RECEIVERS.**Receivers—Expenses—Liability.**

1. Property placed in the hands of a receiver by order of court of equity is chargeable with the necessary expenses incurred in taking care of and saving the property. (*Stacy v. McNicholas*, 167.)

Receivers—Expenses—Liability.

2. Allowance to a receiver as compensation for his services is taxable as part of the costs and is entitled to priority of payment as a lien on the property. (*Stacy v. McNicholas*, 167.)

Receivers—Expenses—Liability.

3. Expenses incurred by a receiver for labor and supplies necessary to care for and preserve the property are taxable as costs and are entitled to priority of payment as a first lien on the property as against a prior mortgage. (*Stacy v. McNicholas*, 167.)

Receivers—Authority—Power of Court.

4. The court appointing a receiver of a private corporation may not authorize the receiver to continue the business, in the absence of consent of prior contract lien creditors. (*Stacy v. McNicholas*, 167.)

Receivers—Expenses—Payment.

5. Expenses incurred by a receiver of mining property in operating the mines not necessary for the care and preservation of the property should be paid as far as possible from the income realized from the mines, and any balance of operating expenses remaining unsatisfied must share with other like claims. (*Stacy v. McNicholas*, 167.)

Receivers—Appointment—Receivers' Certificates.

6. Where a receiver of a corporation was appointed, and necessary expenses for the preservation of the property authorized before a mortgage foreclosure suit, the necessary expenses evidenced by receiver's certificates issued by the clerk under stipulation of the parties are entitled to priority over the mortgage. (*Stacy v. McNicholas*, 167.)

See Bankruptcy, 1.

See Corporations, 1-4, 7, 8.

RECLAMATION.

See Waters and Watercourses, 1.

RECORDS.

See Appeal and Error, 1, 20, 27, 34, 35.

RELEASE.

Release—Relief—Fraud—Evidence.

1. A release obtained from an injured person who acts without independent counsel or advice should be scrutinized with great care, and, upon proof of any facts fairly tending to show fraud or unconscionable advantage in obtaining it, a jury would be warranted in finding it of no effect. (*Nielsen v. Portland Gas & Coke Co.*, 505.)

Release—Conclusiveness—Fraud.

2. Where the evidence discloses no fact or circumstances upon which to base a finding that a release of liability for personal injury was tainted with fraud or imposition, the verdict of a jury

upholding the release should not be disturbed. (Neilsen v. Portland Gas & Coke Co., 505.)

Release—Vacation—Mistake.

3. In an action for personal injury, that plaintiff may have made an unwise bargain and have been mistaken as to the extent of his injury is no sufficient reason for annulling his release fairly made and executed without any fraud on the part of the defendant. (Neilsen v. Portland Gas & Coke Co., 505.)

Release—Validity—Fraud.

4. Unless plaintiff in an action against his master for personal injury was deceived in some way, his release of liability therefor was binding, but, if he was deceived by the doctor employed by defendant, there would be deception by the defendant, and to constitute fraud a representation must be false, as known to defendant actually or by the exercise of ordinary diligence, and made with intent to deceive, and the plaintiff must have been thereby induced to execute the release. (Neilsen v. Portland Gas & Coke Co., 505.)

Release—Question for Jury.

5. In a servant's action for injury, evidence held not to justify instruction permitting jury to ignore plaintiff's release of damages on account of his innocent mistake as to the extent of his injury. (Neilsen v. Portland Gas & Coke Co., 505.)

REMAINDERS.

Remainders—Contingent Remainders—Conveyances.

1. One having a contingent remainder may convey it. (Love v. Lindstedt, 66.)

Remainders—Contingent Remainders—Defeat.

2. Where a testator devised land to his son for life, remainder to the son's issue, with contingent remainders over, and the issue of the son, who were living, as well as other contingent remaindermen, conveyed their interest to the devisee, the devisee acquired the estate in fee, contingent remainders to unborn persons being defeated because the life estate upon which they were based was destroyed. (Love v. Lindstedt, 66.)

REMITTITUR.

See Appeal and Error, 33.

REPLEVIN.

Replevin—Possession of Plaintiff.

1. Where plaintiff in replevin alleges in his reply that when he bought the goods they were in possession of a third person, and introduces a lease showing that such person had a right to possession until some time after suit brought, there can be no recovery, as plaintiff must be entitled to immediate possession. (Bohart v. Parker, 371.)

RESCISSION.

See Exchange of Property, 1.

RESULTING TRUST.

See Trusts, 5.

REVIEW.

See Appeal and Error, 4, 6, 13, 15, 16, 22, 24, 26, 33.

See Criminal Law, 4.

See Highways, 2.

SALES.

Sales—"Conditional Sale."

1. A contract whereby the possession of personal property is delivered to the buyer, who agrees to pay a price therefor with the condition that the title remain in the seller until the price is paid, is a conditional sale. (Francis v. Bohart, 1.)

Sales—Conditional Sale—Suit for Purchase Price—Effect.

2. Where one who sold goods under a conditional sale contract recovered judgment against the buyer for the purchase price and levied execution against part of the property, he thereby elected to treat the title as having passed to the buyer, and cannot thereafter retake the property under his reserved title. (Francis v. Bohart, 1.)

See Execution, 1-3.

SCHOOLS AND SCHOOL DISTRICTS.

Schools and School Districts—Boundary—Construction.

1. Under Section 3965, L. O. L., declaring that the superintendent and county court, or board of commissioners in counties where the board is a separate body, shall constitute a board for the laying off of the county, in convenient school districts, and such board shall make changes when petitioned to do so, the laying off of boundaries for school districts does not constitute part of the business of the County Court, and a failure to record such action in the journals of the court does not render the proceeding void; the board being a distinct and separate body from the County Court. (Magill v. French, 237.)

Schools and School Districts—Public Schools—Division of District.

2. Under Section 4021, L. O. L., declaring that before any new district shall be established, or change made in the boundaries of any existing school district, the superintendent shall post written notices of the boundaries of the new district and of the session of the board when it shall be done, the expression "session" does not refer to sessions of the county court, but to sessions of the board for changing a district, which is composed of members of the County Court and the superintendent of schools. (Magill v. French, 237.)

Schools and School Districts—Boundaries of District—Change.

3. The law does not require proof of the posting of notices of proposed changes in school districts. (Magill v. French, 237.)

Schools and School Districts—Change of Boundaries—Notice.

4. One attacking a change in the boundaries of a school district, on the ground that no notice was given, has the burden of establishing that fact. (Magill v. French, 237.)

Schools and School Districts—Boundaries—Change.

5. Under Section 3965, L. O. L., providing that the superintendent and the County Court or board of county commissioners shall constitute a board for the laying off of the county into school districts, and may, when petitioned to do so, change districts, the authority of the board does not depend on the number of petitioners for a change or the number of remonstrators. (*Magill v. French*, 237.)

Schools and School Districts—Schoolhouses—Liability to Materialman.

6. One furnishing material to a contractor, erecting a schoolhouse for a school district which had neglected to exact a bond required by Section 6266, L. O. L., of anyone contracting with any school district for the construction of any building, with the additional obligation that he will promptly pay all materialmen, had a right of action against the district for damages consequent upon the contractor's insolvency leaving a balance due for the materials furnished. (*Northwest Steel Co. v. School Dist. No. 16*, 321.)

SERVANTS.

See Master and Servants.

SESSION LAWS OF OREGON.

See Table in Front of this Volume.

SPECIFIC PERFORMANCE.**Specific Performance—Contracts Enforceable—Mutuality.**

1. Where there was no such mutuality in the contract to convey as would have entitled the vendor bank to have compelled the cross-complainant as purchaser to pay the purchase price of the land, the alleged contract could not be specifically enforced against the bank. (*Brown v. Farmers & Merchants' Nat. Bank*, 113.)

Specific Performance—Right to—Evidence.

2. Evidence held insufficient to show such part performance that the court would grant specific performance of a parol agreement to convey realty. (*Trowbridge v. Gillette*, 228.)

See Corporations, 11.

STATUTE OF FRAUD.**Frauds, Statute of—Sufficiency of Evidence—Agreement and Memorandum of Sale.**

1. Evidence in behalf of cross-complainant in ejectment claiming under a contract for a conveyance by defendant bank, plaintiff's grantor, held insufficient to prove any written agreement or memorandum to convey the realty, as required by Section 808, L. O. L., subdivision 6. (*Brown v. Farmers & Merchants' Nat. Bank*, 113.)

STATUTES.**Statutes—Title—Sufficiency.**

1. The title of Laws of 1913, page 143, entitled "An act to regulate and license * * the business of commission merchants * *

and to require them to give a bond * * for the benefit of their consignors and prescribing a penalty for the violating of any of the provisions in this act," is not sufficient within Article IV, Section XX, of the Constitution, providing that every act shall embrace but one subject, and matters properly connected therewith, which shall be expressed in the title, to justify provisions in the body of the act conferring on the State Railroad Commission power to require from the merchants statements of their business and to revoke licenses for cause on notice and hearing; and, where these provisions are a dominant feature of the act, the entire act is invalid. (*State v. Levy*, 63.)

Statutes—Title—County Highways—Vacation.

2. Section 6279, L. O. L., authorizing the vacation of county roads and highways, is not repugnant to Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, the title of Laws of 1903, page 262, of which Section 6279 is a re-enactment, being "to provide for the laying out, establishing, constructing, improving, and relocating of county roads, for the establishment of road districts, the appointment of supervisors," etc., since the title of an act need not express all matters connected with the subject and embodied in the enactment, so long as it is fairly an index to the proposed legislation. (*Heuel v. Wallowa County*, 354.)

Statutes—Title—Amending Act—Constitutionality.

3. Section 6279, L. O. L., authorizing the vacation of county highways, a re-enactment of Laws of 1903, page 262, if repugnant to Article IV, Section 20, of the Constitution, providing that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, was cured by Laws of 1913, page 296, entitled "An act to amend Section 6279 of L. O. L., relating to petitions, for road dedication and acceptance," since thereby the whole of the section amended served as a title to the law of 1913. (*Heuel v. Wallowa County*, 354.)

Statutes—Adoption of Statute of Sister State—Construction.

4. Where the legislature adopts a statute from another state, the construction given the act by the courts of the other state prior to its enactment in this state usually governs in interpreting such act here. (*Dale v. Marvin*, 528.)

Statutes—Construction—Intention of Legislature.

5. A legislative act must be so construed as to make it operative, and to carry out the purposes indicated by the lawmakers. (*Rathfon v. Payette-Oregon Slope Irr. Dist.*, 606.)

See Action, 2.

See Appeal and Error, 4, 30.

See Bills and Notes, 1.

See Deeds, 2.

See District and Prosecuting Attorneys, 1.

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See Exceptions, Bill of, 3.

See False Pretenses, 1.

See Highways, 1, 3.
 See Husband and Wife, 1.
 See Intoxicating Liquors, 1.
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 See Judgment, 1.
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 See Waters and Watercourses, 3, 6.
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STOCK SUBSCRIPTION.

See Corporations, 10.

STREET IMPROVEMENTS.

See Municipal Corporations, 11-14.

STREET RAILROADS.

Street Railroads—Collisions—Care Required of Travelers.

1. An instruction, in an action for injuries in a collision with a street-car, that a person could not go on a street-car track without first looking to see whether a car is approaching, but need not stop unless his view is so obstructed that he cannot see any distance, and that, where his view is so obstructed, he must stop and use the degree of care which an ordinary prudent man would use to discover whether a car is approaching, sufficiently submits the issue of the traveler's due care. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Street Railroads—Collisions—Care Required of Travelers.

2. A traveler approaching a street on which street-cars are operated must look and listen for approaching cars to the extent that a reasonably prudent person would do, and a person keeping a proper lookout and listening uses reasonable care. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Street Railroads—Collisions—Care Required of Travelers.

3. Where a traveler, approaching a street on which cars are operated, saw an approaching car in such close proximity that he knew, or should have known, that to proceed to cross was liable to result in a collision, and at the time, by using due care, he could have stopped, but made no effort to do so, he was guilty of negligence; but the fact that a person sees a car approaching does not alone show negligence because of an attempt to cross the track, and the quantum of care necessary must be determined by the proximity and speed of the car and the surrounding circumstances. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Street Railroads—Use of Streets—Rights of Travelers.

4. The right of a street railway company to use a street is not exclusive merely because a traffic ordinance gives cars the right of

way as against travelers, and a traveler may proceed to cross in front of an approaching car when he has reasonable ground for believing that he can pass in safety, if both he and those in charge of the car act with due regard to the rights of others. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Street Railroads—Instructions—Misleading Instructions.

5. Instructions, in an action for injuries in a collision with a street-car, which impose on the traveler the duty of looking and listening, and which defines the circumstances under which he must stop before crossing a street-car track, and which declares that the traveler must conform to the obligations imposed, with the same care that would have been exercised by a reasonably cautious man, were not objectionable as leading the jury to believe that the rule of ordinary care was the sole standard by which to measure the traveler's conduct. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

Street Railroads—Collisions—Injuries to Traveler—Evidence—Admissibility.

6. A traveler, suing a street railroad company for injuries in a collision with a street-car, may explain what he saw and how the situation appeared to him, when he attempted to cross in front of the approaching car, so that the jury may determine whether he in fact used reasonable care. (*Macchi v. Portland Ry., L. & P. Co.*, 215.)

STRICT FORECLOSURE.

See Mortgages, 1.

SUBROGATION.

See Insurance, 1-3.

SUBSTITUTION.

See Appeal and Error, 29.

SUPREME COURT RULES.

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SWIMMING-POOLS.

See Negligence, 2, 3.

TAXATION.

Taxation—Collection—Injunction.

1. Where a suit by the federal government to forfeit land for breach of the condition of the grant was pending, and the owner of the land was resisting the forfeiture and claiming to be the owner in fee, he is estopped to litigate the right of the county to tax the land as his property, and equity will not enjoin the collection of the taxes pending the outcome of the federal suit, even though the owner pays the amount of the taxes into court. (*Southern Oregon Co. v. Gage, Sheriff*, 427.)

TAXATION OF COSTS.

See Costs, 1-4.

TESTAMENTARY CAPACITY.

See Wills, 4, 8.

TIME.**Time—Time for Appeal—Computation—Exclusion of First or Last Day.**

1. In computing the time of such extension, the day on which the act went into effect should be excluded and the last day should be included so that the time would expire on August 2d at midnight. (Walling v. La Follette, 497.)

Time—Computation—Days.

2. Where a notice of appeal was served and filed on June 22d, an undertaking served and filed July 3d was in time; June 23d being excluded in computing the 10 days allowed. (Vincent v. First Nat. Bank, 579.)

Time—Computation—Days.

3. Where the transcript was filed August 19th an abstract filed September 9th was in time. (Vincent v. First Nat. Bank, 579.)

TITLE.

See Adverse Possession, 2.

See Execution, 3.

See Quieting Title, 5, 6, 7.

See Statutes, 1, 2, 3.

TRANSCRIPT.

See Appeal and Error, 28, 35.

See Costs, 6, 7, 8.

TRESPASS.

See Injunction, 1.

TRIAL.**Trial—Evidence—Admissibility.**

1. A plaintiff may, as a part of his case in chief, offer evidence in support of his theory, and is not precluded from so doing merely because defendant states something different in his answer. (Macchi v. Portland Ry., L. & P. Co., 215.)

Trial—Instructions—Construction.

2. The instructions must, to determine their correctness, be considered as a whole, and if, when so considered, they correctly state the law, they are sufficient. (Macchi v. Portland Ry., L. & P. Co., 215.)

Trial—Instruction—Weight of Evidence.

3. Where defendant took title to land, mortgaged and executed a warranty deed to the president of a corporation which did not mention the mortgage, and recited an inflated consideration, it was improper, in a suit by the corporation against defendant and the president to recover damages for the act of the president in conveying the land to the corporation at an inflated price, to charge that

the fact defendant took title to the property and executed a mortgage, and thereafter gave a warranty deed to the corporate president, did not show fraud, for fraud is a question of fact, which may be established by circumstantial evidence, and it is improper for the court to direct a jury as to inferences to be drawn from any particular evidence. (*Saratoga Inv. Co. v. Kern*, 243.)

Trial—Conduct of Judge—Remarks in Ruling.

4. In an action by a bank on a note given for stock, the defense was the false representations of the agents of the bank and the corporation whose stock was sold as to the resources of the company, and, in ruling on the admissibility of a letter of the cashier of the bank, the court stated: "It will be a question for the jury to determine whether these parties were acting in conspiracy to work out this fraud." *Held*, that the reference to "this fraud" was not objectionable as a reference to fraud by plaintiff; there being no question but what there was fraud on the part of the corporation. (*Bank of Gresham v. Walch*, 272.)

Trial—Instructions—Application to Issues.

5. In an action for the conversion of collateral security, where defendant alleged that the collateral was still in its possession undisposed of and subject to the conditions under which it was first disposed, an instruction that the question in the case was whether defendant was authorized to make the disposition of the security "admitted by all to have been made" was erroneous. (*Madden v. Condon Nat. Bank*, 363.)

Trial—Remark of Court—Harmless Error.

6. Where counsel was proceeding to argue a ruling on evidence as to the reputation of a witness, the court's remark that he would leave it to the jury was not prejudicial. (*Bohart v. Parker*, 371.)

Trial—Instructions—Applicability to Issues—Negligence.

7. Where a complaint for injuries to a pedestrian on a city street made no charge that defendant's wagon was being driven at improper speed, a requested charge, predicated in part on a finding of excessive speed, was properly refused. (*Delovage v. Old Oregon Creamery Co.*, 430.)

Trial—Use of Streets—Actions for Injuries—Instructions—Assumption of Facts.

8. A requested instruction that a person who sees no wagon approaching for a sufficient distance to warrant a cautious person in believing it is safe to attempt a crossing has a right to proceed, relying upon the assumption that a warning would be given of an approaching vehicle, is erroneous as assuming that it was the duty of a driver to give a warning, which was a question of fact for the jury. (*Delovage v. Old Oregon Creamery Co.*, 430.)

Trial—Use of Streets—Requested Instructions—Modification.

9. Where a complaint for injuries to a pedestrian on a city street did not charge the driver of the wagon with losing control thereof, it was proper for the trial court to modify a requested instruction that it was the duty of travelers by vehicles to keep the same under control so as not to injure pedestrians in the proper exercise of their rights, so as to charge that it was the duty of each to exercise rea-

sonable care under the circumstances. (*Delovage v. Old Oregon Creamery Co.*, 430.)

See Assault and Battery, 1.

See Criminal Law, 3.

See Eminent Domain, 2.

TROVER AND CONVERSION.

Trover and Conversion—"Conversion"—What Constitutes.

1. Conversion consists in the exercise of dominion and control over property inconsistent with, and in denial of, the rights of the true owner or the party having the right to possession. (*Madden v. Condon Nat. Bank*, 363.)

Trover and Conversion—Defenses.

2. It is a defense to an action for conversion that plaintiff was not damaged. (*Madden v. Condon Nat. Bank*, 363.)

TRUSTS.

Trusts—Enforcement—Consideration—Support of Aged Person—Charge on Land.

1. Where the grantee named in a deed of land in trust to sell it and apply the proceeds in caring for the aged grantor during her life, with remainder over, neglected or refused to properly maintain the grantor, and an action against him would not have afforded an adequate remedy, a court of equity, upon proper and timely application, might charge the land for such maintenance, if it had not been conveyed. (*Robison v. Hicks*, 19.)

Trusts—Estate Conveyed—Fee.

2. In view of Section 7103, L. O. L., declaring that the term "heirs" or other words of inheritance are unnecessary to create or convey an estate in fee simple, a deed to one in trust to sell the land conveyed an estate in fee. (*Robison v. Hicks*, 19.)

Trusts—Action to Establish—Evidence—Declaration of Decedent.

3. Where plaintiffs sued to establish a trust in their favor in land conveyed to defendants by their father, declarations by the father, to a plaintiff, that there was an agreement in the room where he was sick, signed by defendants, to the effect that the land was to come back to him after his debts had been paid, were not admissible as hearsay, under Section 732, L. O. L., providing that, when a party to a proceeding by or against an executor or administrator appears as a witness in his own behalf or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject matter in his own favor may also be proven; since the instant suit was not such a proceeding by or against an executor or administrator. (*Chance v. Graham*, 199.)

Trusts—Trust in Land—Statute—Sufficiency of Evidence.

4. In an action to enforce a trust alleged to have been declared by decedent in conveying land to defendants, evidence held, insufficient to establish such trust under Section 804, L. O. L., providing that no estate or interest in real property other than a lease for a term not exceeding one year nor any trust or power concerning suca

property can be created except by operation of law, or by an instrument in writing subscribed by the party so creating the trust, or his lawful agent, and executed with the formalities required by law. (Chance v. Graham, 199.)

Trusts—Resulting—Constructive.

5. Resulting and constructive trusts cannot be created by acts of the parties involved subsequent to the conveyance; since they are obligations imposed by law, which is constantly operant, attaching the consequences to be derived from the acts of the parties without delay. (Chance v. Graham, 199.)

Trusts—Constructive Trusts—Sufficiency of Evidence.

6. In an action to enforce a constructive trust alleged to have arisen through the fraudulent intent of the grantees of land not to reconvey, evidence *held* insufficient to establish such trust. (Chance v. Graham, 199.)

Trusts—Constructive Trust—Deed Absolute on Face—Contradiction—Evidence.

7. The law requires the most clear, explicit and satisfactory evidence to establish a constructive or resulting trust contrary to a deed absolute on its face. (Chance v. Graham, 199.)

Trusts—Declaration of Trust—Failure to Give Notice of Trust.

8. Where a purchaser, to procure money to pay on the contract, made a contract with a third person to advance money, and agreed to secure the title to the land and hold one half for the third person and execute a declaration of trust, but the purchaser never legally recognized the third person's interest, the third person was not negligent for failure to give notice of the trust charged on the land. (Weber v. Richardson, 286.)

Trusts—Enforcement—Evidence.

9. A purchaser of real estate, to procure money to make payments under the contract, contracted with a third person to advance money, and agreed to take title in his own name, but to hold one half of the real estate for the third person and execute a declaration of trust. The purchaser organized a corporation, and it acquired title to all the real estate and the purchaser, who was an officer, obtained stock in the corporation. The stock was transferred to another stockholder without consideration. *Held* that, though it be assumed that the corporation had no knowledge of the contract between the purchaser and the third person whereby a trust was to be charged on the land in favor of the third person, the stock was in equity impressed with a trust in favor of the third person to the amount of his equitable interest. (Weber v. Richardson, 286.)

Trusts—Enforcement—Decree.

10. A decree which adjudges that, on payment by defendant to plaintiff of a specified sum, real estate described shall be discharged from a trust in favor of plaintiff, but if the payment is not made plaintiff shall have a lien on the property as security, must fix a time within which payment shall be made. (Weber v. Richardson, 286.)

Trusts—Enforcement—Decree.

11. A decree which adjudges that, on payment by defendant to plaintiff of a specified sum, certain real estate shall be discharged

from a trust in favor of plaintiff, but on a failure to pay plaintiff shall have a lien as security for the payment of the amount, must provide that plaintiff, on receiving payment or taking title, shall convey to defendant an interest in other real estate which had been conveyed to him as security. (*Weber v. Richardson*, 286.)

UNDERTAKING.

See Appeal and Error, 29.

UNDUE INFLUENCE.

See Wills, 6, 7, 8.

UNITED STATES STATUTES.

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USE OF STREETS.

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VACATION.

See Highways, 1-3.

See Release, 2.

See Statutes, 2.

Reasonable Excuse for Allowing a Default Judgment.

See Equity, 1.

VARIANCE.

See Quieting Title, 7.

VENDOR AND PURCHASER.

Vendor and Purchaser—Support of Grantor—Lien—Action to Enforce—Pleading.

1. In an action to impress a lien for maintenance on real property which had been previously conveyed to one in fee in consideration of the grantor's maintenance, it was necessary for the complaint to aver that defendants, taking by mesne conveyances, acquired their title with knowledge or notice of plaintiff's claim of lien, in order to let in proof thereof, before the lien could be impressed on the land. (*Robison v. Hicks*, 19.)

Vendor and Purchaser—Offer and Acceptance—Withdrawal.

2. An offer to convey realty until accepted is subject to withdrawal without prejudice to the party making it, and where the alleged purchaser knew nothing of the offer, there was no prejudice in its withdrawal, and the vendor was not under obligation to renew the offer. (*Brown v. Farmers & Merchants' Nat. Bank*, 113.)

Vendor and Purchaser—Bona Fide Purchaser—Notice—Instrument not Entitled to Record.

3. The recording of a contract neither sealed, witnessed, nor acknowledged does not impart notice. (*Weber v. Richardson*, 286.)

VERDICT.

See Eminent Domain, 1, 2.

VERIFICATION.

See Costs, 1.

WAIVER.

See Costs, 2.

See Deeds, 4.

See Insurance, 3.

See New Trial, 1.

See Parties, 1.

See Quieting Title, 4.

See Quo Warranto, 3.

WATERS AND WATERCOURSES.**Waters and Watercourses—Reclamation and Irrigation—Contracts—Acreage of Irrigable Lands.**

1. The Carey Act (Act Aug. 18, 1894, c. 301, 28 Stat. 378 [U. S. Comp. Stats. 1913, § 4686]), as amended, provides that, when a sufficient supply of water is actually furnished in a substantial ditch to reclaim a particular tract, patent shall issue therefor, and the rules of the Secretary of the Interior require that all irrigable land in each legal subdivision is to be thoroughly irrigated and reclaimed by the contract with the state and the rules made pursuant thereto. Under Section 4 of the Federal act and the acts supplementary thereto, and Act of February 24, 1909 (Laws 1909, p. 377), accepting it, the state, by its land board, contracted with plaintiff's predecessor to reclaim and irrigate land in accordance with plans filed with the state and made a part of the contract, which provided that the land should be thereafter examined, estimated and reported as a basis of reclamation liens, and plaintiff prepared a map listing the number of irrigable acres on each subdivision, the examination and report of which was approved by the state land board and furnished to the Secretary of the Interior for patent. Two tracts, in each of which the report showed 15 irrigable acres, though a more accurate subsequent topographical survey showed 25 and 26 acres, were released from lien with reference to the lands, etc., of the state's contract, and subject to the annual irrigation charge of one dollar per acre as fixed therein, by contract providing that plaintiff would supply water sufficient to irrigate each tract in the list for patent. *Held*, that defendant was entitled to water for only 30 acres, and that his breaking of plaintiff's gates to take more than sufficient therefor would be enjoined. (Central Oregon Irr. Co. v. Whited, 255.)

Waters and Watercourses—Irrigation—Irrigation Districts—Irrigation Improvement Companies—"Public Corporation"—"Quasi-public Corporation."

2. The irrigation districts provided for by Section 6167 et seq., L. O. L., as amended by Laws of 1911, page 378, are "public corporations," and by the amendment of 1915 (Laws 1915, p. 234), are municipal subdivisions of the state, with the power of self-government and control in all matters relating to the general purpose of their

organization, while district improvement companies, the organization of which are authorized by Laws of 1911, page 256, are also "quasi-public corporations." (*Rathfon v. Payette-Oregon Slope Irr. Dist.*, 606.)

Waters and Watercourses—Irrigation District—Inclusion of Land in Improvement District—Statutes.

3. Section 6167 et seq., L. O. L., as amended by Laws of 1911, page 378, provides for the organization of irrigation districts on proposal of 50 or a majority of the holders of title to lands susceptible of irrigation from common sources and by the same system, and also provides that there shall be excluded from any such district lands already irrigated or entitled to be irrigated from any source or by another system of irrigation works. Laws of 1911, page 256, provides for the incorporation of land owners as improvement companies, and that on such incorporation and record of notice thereof, the debts of such corporation shall be a prior lien on the lands described in the notice. Plaintiff's lands were included in an irrigation district against his petition after he had become a member of a district improvement company, whose members, including himself, had executed and recorded the notice subjecting their land to the liabilities of the corporation, among which were bonds sold aggregating \$55,000. *Held*, that plaintiff's land was not included in the district and not open to its assessments, as the legislature by the acts providing for irrigation districts and improvement companies did not intend to provide for separate quasi-public corporations to exercise the same delegated powers within the same area for a similar purpose at the same time, since if the irrigation district had power to tax plaintiff's land and sell the same on execution for nonpayment, nothing would be left to satisfy the liabilities of the district improvement company of which plaintiff was a member, and the obligation of its contracts would be impaired in violation of Article I, Section 21, of the Constitution. (*Rathfon v. Payette-Oregon Slope Irr. Dist.*, 606.)

Waters and Watercourses—Irrigation District—Exclusion of Lands—Estoppel.

4. Plaintiff, member of a district improvement company organized under Laws of 1911, page 256, was not estopped to contend that his lands were not rightfully included within an irrigation district, organized under Section 6167 et seq., L. O. L., as amended by Laws of 1911, page 378, merely because he did not appeal from the order of the board of directors of the irrigation district denying his petition for exclusion, since the irrigation district law (Laws 1911, p. 402, Section 33) provides for no appeal from such an order, while the question presented by plaintiff's petition was not determined in the suit brought under Section 33 by the directors of the irrigation district to have the organization of the district declared valid. (*Rathfon v. Payette-Oregon Slope Irr. Dist.*, 606.)

Waters and Watercourses—Irrigation Districts—Proceedings of Board of Directors—Resolution Proposing Bond Issue.

5. A reasonable construction of the language found in a record of a resolution of the board of directors of an irrigation district, authorizing a bond issue, should be given to make the same express

its intent as manifested, since the technicality of a court record cannot be expected therein. (Payette-Oregon Slope Irr. Dist. v. Peterson, 630.)

Waters and Watercourses—Irrigation Districts—Bonds—Notice—Statute.

6. Under Section 6184, L. O. L., providing that before making a sale of irrigation district bonds, the board of directors shall, by resolution, declare its intention to sell a specified amount, fix the time and place of such sale, and give notice by publication thereof at least 30 days in three newspapers published in the state, one of which shall be a newspaper published in the county in which the office of the board of directors is situated, if a newspaper is published in such county, where the time of receiving bids for the sale of such bonds was fixed at 11 A. M. on July 15, 1914, and notice was published in one morning newspaper five successive Fridays, from June 12th to July 10th, in a second paper, a weekly, five times from June 13th to July 11th, and in a third paper, another weekly, five times from June 11th, to July 9th, the publication was sufficient, under the statute, since under the rule of computation that one week is equivalent to seven days, the notice was published for more than 30 days. (Payette-Oregon Slope Irr. Dist. v. Peterson, 630.)

WILLS.

Wills—Estates—Interest Devised.

1. Where a testator, after devising property in fee, added a codicil, declaring that the devise should be for the sole and separate use of the devisee, and that in case of his death without lawful issue, to others, the devisee took a life estate with remainder over. (Love v. Lindstedt, 66.)

Wills—Contingent Remainders—What are.

2. Where a testator devised property to one for life, remainder to his issue, and in case of his death without issue remainders over, the issue of the devisee have a contingent remainder, because the fee could only vest in them if they survived him. (Love v. Lindstedt, 66.)

Wills—Construction—Contingent Remainders and Executory Devises.

3. A future estate will be construed as a contingent remainder rather than an executory devise. (Love v. Lindstedt, 66.)

Wills—Validity—"Testamentary Capacity."

4. Where a testator at the time he executes his will understands the business in which he is engaged, has knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses "testamentary capacity," notwithstanding old age, sickness, disability or extreme distress. (In re Diggins' Estate, 341.)

Wills—Validity—Incapacity—"Delusion."

5. A "delusion" indicating testamentary incapacity must spring up spontaneously in the mind of the testator, and not be the result of extrinsic evidence of any kind. (In re Diggins' Estate, 341.)

Wills—Validity—"Undue Influence."

6. "Undue influence" sufficient to set aside a will must be such as to overcome the free volition or conscious judgment of the testator and to substitute the purposes of another instead, and must be the efficient cause of the disposition of the property. (*In re Diggins' Estate*, 341.)

Wills—Validity—Undue Influence—Confidential Relations.

7. Where a confidential relationship existed between testator and the beneficiary, and the will is inconsistent with the claims of duty and affection, slight evidence that the beneficiary has abused the confidence will suffice to invalidate the will. (*In re Diggins' Estate*, 341.)

Wills—Contest—Evidence—Incapacity—Undue Influence.

8. In proceedings to contest a will, evidence held to show that the testator had sufficient testamentary capacity; that he was under no delusion as to the amounts he had given contestant and was not unduly influenced. (*In re Diggins' Estate*, 341.)

WITNESSES.**Witnesses—Competency—Grand Juror.**

1. Section 1427, L. O. L., declares that a grand juror cannot be questioned for anything he may say or any vote he may give while acting as such, except for a perjury of which he may have been guilty, while Section 1431 prohibits the disclosure of facts by a grand juror. Held, that, in a criminal prosecution, it was not error to permit a grand juror to testify that accused was examined before the grand jury. (*State v. Boysen*, 48.)

Witnesses—Re-examination—Explanation of Testimony.

2. It is competent for the state to explain a transaction called out by defendant on the cross-examination of a witness. (*State v. Canton*, 51.)

Witnesses—Competency—"Unsound Mind."

3. A weak-minded degenerate is not a person of "unsound mind," prohibited from testifying by Section 731, L. O. L., and his testimony, admitted without objection, will not be rejected. (*State v. Canton*, 51.)

Witnesses—Credibility—Voucher by Calling.

4. A party who calls a witness thereby vouches for his credibility. (*Chance v. Graham*, 199.)

Witnesses—Impeachment—Statute.

5. Under Section 861, L. O. L., providing that the party calling a witness may not impeach him by evidence of bad character, but may contradict him, and may show past statements inconsistent with his present testimony, in a prosecution for larceny, where defendant called a certain witness, the court properly refused to permit defendant to recall him to lay "the grounds for impeachment." (*State v. Gulliford*, 231.)

Witnesses—Impeachment.

6. In a prosecution for larceny of cattle, where defendant attempted to impeach his own witness, on the ground of his membership in a cattlemen's association, without proving the existence of such association or its relevancy to the case, such attempt was properly stopped by the court. (State v. Gulliford, 231.)

Witnesses—Impeachment—Evidence.

7. In a prosecution for larceny of cattle, a question to a witness for the prosecution, whether before the justice court he had not failed to testify to certain conversations with the defendant as to such defendant's whereabouts at the time of the crime, was properly excluded as incompetent, immaterial and irrelevant, unless it was shown that the witness was asked of such conversations before the justice. (State v. Gulliford, 231.)

See Criminal Law, 1.

See Evidence, 2, 3.

WORDS AND PHRASES.

"Bill of Exceptions"—Kubik v. Davis, 501.

"Color of Title"—School District No. 5 v. Neder, 552.

"Conditional Sale"—Francis v. Bohart, 1.

"Conversion"—Madden v. Condon Nat. Bank, 363.

"Delusion"—In re Diggins' Estate, 341.

"General Verdict"—Skelton v. Newberg, 126.

"Hostile"—Mascall v. Murray, 637.

"Inconsistent Defenses"—Susznik v. Alger Logging Co., 189.

"Peaceable"—Mascall v. Murray, 637.

"Public Corporation"—Rathfon v. Payette-Oregon Slope Irr. Dist., 606.

"Quasi-public Corporation"—Rathfon v. Payette-Oregon Slope Irr. Dist., 606.

"Railroad"—Morgan v. Grande Ronde Lumber Co., 440.

"Sawmill Tally"—Cody Lumber Co. v. Coach, 106.

"Testamentary Capacity"—In re Diggins' Estate, 341.

"Undue Influence"—In re Diggins' Estate, 341.

"Unsound Mind"—State v. Canton, 51.

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